SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 72

CARL SIMON, ET AL., PETITIONERS,

vs.

IRVING L. WHARTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Crim. 831

THE UNITED STATES OF AMERICA, Plaintiff,

—against—

CARL SIMON, HAROLD ROTH, ROBERT KAISER, MELVIN FISHMAN, Defendants.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—Filed November 2, 1966

Upon the annexed affidavits of Marvin Schwartz and Thomas W. Hill, sworn to November 1, 1966, the indictment herein filed October 17, 1966 and upon all papers filed and prior proceedings had herein and sufficient cause appearing therefor, it is

Ordered that plaintiff United States of America and Irving L. Wharton, as Trustee in Reorganization of Continental Vending Machine Corp. in a proceeding pending under Chapter X of the Bankruptcy Act in the U.S. District Court for the Eastern District of New York show cause before this Court at a Criminal Motion Part thereof to be held at Room 318, United States Court House, Foley Square, New York, New York, on November 4, 1966 at 10:30 A.M. or as soon thereafter as counsel may be heard why an order should not be entered herein pursuant to 28 U.S.C. § 1651, pending the trial of this action;

[File endorsement omitted]

1. Staying and enjoining Irving L. Wharton, as Trustee in reorganization of Continental Vending Machine Corporation in a proceeding pending under Chapter X of the Bankruptcy Act in the United States District Court for the Eastern District of New York, his attorneys and agents from the further prosecution of any and all suits or claims against Lybrand, Ross Bros. & Montgomery, including without limitation of the foregoing the civil action entitled [fol. 267] *Wharton* v. *Lybrand et al.*, 65 Civ. 664 pending in United States District Court for the Eastern District of New York;

2. Staying and enjoining the said Irving L. Wharton, as Trustee in reorganization, his attorneys and agents from taking the testimony before trial of the defendants Carl Simon, Robert Kaiser or Melvin Fishman or of any other partner or employee of Lybrand, Ross Bros. & Montgomery or from seeking to compel the production of files, records or documents by the defendants Simon, Kaiser or Fishman or by Lybrand, Ross Bros. & Montgomery or any partner or employee thereof in any suit or proceeding of any kind, including without limitation of the foregoing actions pending in the United States District Court for the Eastern District of New York entitled *Wharton* v. *Lybrand et al.*, 65 Civ. 664 and *Wharton* v. *Roth et al.*, 64 Civ. 946 and granting such other and different relief as to the Court may seem just and proper; and it is further

Ordered that pending the hearing of this motion, Irving L. Wharton, as Trustee in said reorganization of Continental Vending Machine Corporation, his attorneys and agents be and the same hereby are enjoined from taking the testimony before trial of the defendants Simon, Kaiser or Fishman or of any other partner or employee of Lybrand, Ross Bros. & Montgomery or from seeking to compel the production of files, records or documents by the defendants Simon, Kaiser or Fishman or by Lybrand, Ross Bros. & Montgomery or any partner or employee thereof in [fol. 268] any suit or proceeding of any kind, including,

without limitation of the foregoing, actions pending in the United States District Court for the Eastern District of New York entitled *Wharton* v. *Lybrand et al.*, 65 Civ. 664 and *Wharton* v. *Roth et al.*, 64 Civ. 946; and it is further

Ordered that service of a copy of this order and the papers submitted in support thereof upon the United States Attorney for the Southern District of New York, and upon Messrs. Christy, Bauman & Christy, attorneys for the said Irving L. Wharton, as Trustee, at their offices at 45 Rockefeller Plaza, New York, New York, on or before 6 p.m. o'clock on November 1, 1966 shall be good and sufficient service thereof; and it is further

Frederick v. P. Bryan, U. S. D. J.

[fol. 269]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Crim. 831

THE UNITED STATES OF AMERICA,

vs.

CARL SIMON, HAROLD ROTH, ROBERT KAISER, MELVIN FISHMAN, Defendants.

AFFIDAVIT OF MARVIN SCHWARTZ, DATED NOVEMBER 1, 1966, IN SUPPORT OF MOTION FOR INJUNCTION

State of New York,
County of New York, ss.:

Marvin Schwartz, being duly sworn, deposes and says:

1. I am a partner in the firm of Sullivan & Cromwell, attorneys for defendants Carl Simon, Robert Kaiser and

Melvin Fishman in this action. I make this affidavit in support of a motion by these defendants to enjoin, pending the trial in this action, all further proceedings as against them and as against the accounting firm with which they are associated in related civil actions brought in the United States District Court for the Eastern District of New York entitled *Wharton* v. *Lybrand, Ross Bros., et al.*, 65 Civ. 664 and *Wharton* v. *Roth, et al.*, 64 Civ. 946.

2. An indictment filed in this action on October 17, 1966 accuses the three moving defendants of mail fraud and of conspiracy to file false documents with the Securities and Exchange Commission. The moving defendants are two partners and one employee of Lybrand, Ross Bros. & Montgomery ("Lybrand"), a well-known national firm of independent public accountants. All three moving defendants are certified public accountants. The indictment relates principally to the 1962 financial statements of Continental [fol. 270] Vending Machine Corporation, a client of Lybrand. The essence of the indictment, as we understand it, is that the individual defendants, conspiring with the Lybrand firm and others, caused the filing and distribution through the mails of a false financial statement. We think it undisputed that the moving defendants' sole connection with the allegedly false financial statement was as independent public accountants, so that the function with respect to which they stand accused was to examine and express an opinion upon the financial statements of their client.

3. My firm was retained to act as attorneys for the defendants Simon, Kaiser and Fishman in this action on Thursday, October 27, 1966. Prior to Thursday, October 27, 1966, my firm had not acted for the defendants or for the Lybrand firm in connection with this proceeding or any related civil proceeding.

4. I am informed that on July 1, 1965, Irving L. Wharton as Trustee in the reorganization proceedings of Continen-

tal Vending Machine Corporation ("Continental") under Chapter X of the Federal Bankruptcy Act in the United States District Court for the Eastern District of New York, commenced a civil action in that court in behalf of Continental against Lybrand, two banks and Harold Roth, the former president of Continental. A copy of the complaint in that action is annexed hereto as Exhibit 1. In that action, the Trustee has asked for damages against the defendants in the amount of $41,000,000, alleging as against Lybrand that among other things it prepared a false annual report of Continental for the year 1962. The allegations in that action are substantially identical to those made in the indictment in this case. The three moving defendants in this action were not named as defendants in the *Wharton* action.

[fol. 271] 4a. I am informed that on September 25, 1964, the Trustee commenced another action in the United States District Court for the Eastern District of New York against various officers and directors of Continental and others. A copy of that complaint is annexed hereto as Exhibit 2. Since the moving defendants here, Messrs. Simon, Kaiser and Fishman, participated in Lybrand's examination of the financial statements of Continental, further proceedings in either of these actions as against Lybrand would necessarily involve the time and attention of Messrs. Simon, Kaiser and Fishman.

5. I am informed that on or about October 13, 1966, shortly prior to the filing of the indictment in this action, counsel for Lybrand in the civil action agreed orally with counsel for Trustee Wharton that the latter could take the depositions of Mr. Kaiser and Mr. Fishman in both civil actions. The deposition of Mr. Simon had previously been taken. The deposition of Mr. Kaiser is currently in progress; he testified in the civil actions on October 27 and October 31 and he is scheduled to resume testimony on November 2 and 4. I am informed that his testimony is expected to continue for many days thereafter.

6. When the Grand Jury Indictment was filed in this Court on October 17, 1966, Mr. Kaiser moved before Judge Mishler in the Eastern District of New York under Rule 30(b) of the Federal Rules of Civil Procedure for a protective order staying the taking of Mr. Kaiser's deposition on the grounds that it would be burdensome and would violate his constitutional rights in view of the recently commenced criminal action.

7. On October 24, 1966, Judge Mishler denied that motion. A copy of his opinion is annexed hereto as Exhibit 3.

[fol. 272] 8. The order of Judge Mishler was appealed to the United States Court of Appeals for the Second Circuit, but a motion for a stay was denied and the appeal was dismissed without opinion on October 25, 1966.

9. We respectfully ask this Court to enjoin, during the pendency of this prosecution, all proceedings by the trustee as against Lybrand, for the following reasons:

(a) Protracted pre-trial depositions and discovery in the civil actions will prevent the defendants and their counsel from preparing adequately for the defense of this criminal proceeding.

(b) Continued testimony in the civil actions by Mr. Kaiser and by Mr. Fishman—on the very issues raised by the indictment—would probably preclude all possibility of a fair trial in this criminal proceeding.

10. I am informed that the deposition of Mr. Simon in the Trustee's civil actions has been adjourned *sine die*. I am informed further that Mr. Simon testified for 16 days and that the transcript covers over 1800 pages. I am informed that Mr. Kaiser's testimony, which is scheduled to resume on Wednesday and Friday, November 2 and 4, 1966, is expected to continue for approximately 10 or more days and that the testimony of Mr. Fishman is expected to take even longer.

11. I am informed that Main Lafrentz & Co., a firm of accountants retained by the Trustee, has been engaged since April 1, 1966 in a continuous examination of the files of the Lybrand firm relating to its engagement as accountants for Continental. It seems obvious that these are the very files which we, as counsel for the moving defendants in this criminal action, will require to be available to us for close and continuous study until the trial is concluded.

12. It also seems obvious that we, as counsel for the moving defendants in this criminal proceeding, will be [fol. 273] hindered in our preparation of the defense by the unavailability of our clients because of preoccupation with testimony in the civil proceedings and by the unavailability of documents because of the demands of the Trustee's accountants.

13. As appears from the annexed affidavit of Thomas W. Hill, Jr., the United States Attorney's office in this District has continuously received from the attorneys for the Trustee information which the attorneys for the Trustee have gathered from their discovery and deposition proceedings in the civil actions. This flow of information from the Trustee to the United States Attorney for the Southern District of New York, if continued after the filing of the indictment, would prevent the fair trial of this criminal proceeding, for it would enable the United States Attorney's office to obtain indirectly, and, we submit, improperly, pretrial depositions and discovery which are not permitted by the Federal Rules of Criminal Procedure. The very fact that depositions are being taken in the civil proceedings after the filing of the indictment raises the substantial question whether the defendants in this criminal proceeding are being compelled improperly to give discovery for use in the criminal case in violation of the Federal Rules of Criminal Procedure and in violation of their constitutional rights. Substantial questions are presented also by the fact that a representative of Main Lafrentz &

Co., the Trustee's accountants, testified, I am informed, before the Grand Jury which returned the indictment in this proceeding.

14. We will hand to the Court on the argument of this motion the transcript of the testimony given by Mr. Kaiser on October 24 and October 31. The transcript demonstrates that substantially all of the questions put to Mr. Kaiser by [fol. 274] the attorneys for the Trustee related to a certain footnote appearing in the 1962 financial statement of Continental. This is the very footnote alleged in paragraph 8(B) of Count 1 and paragraph 3(B) of Count 2 of the indictment. Moreover, as appears from even the most cursory examination of the transcript, the questions put to Mr. Kaiser by the attorneys for the Trustee are so clearly objectionable in form that they would not be permitted at the trial of a criminal case in this Court.

15. I submit that the granting of the injunction we seek is not likely to result in substantial prejudice to the Trustee. I am informed that the attorneys for the Trustee have announced their intention to take the depositions of approximately 32 persons. I am informed further that more than 20 of the potential witnesses are persons who are not associated or affiliated with the Lybrand firm. It would thus appear that in the months ahead until the trial of this criminal proceeding is concluded, the Trustee could proceed in the prosecution of his civil actions in a manner which would not prejudice the defendants in this criminal case. In any event, I respectfully submit that the prejudice to the defendants in continued deposition and discovery proceedings in the civil actions far outweighs the potential prejudice which could result to the Trustee from the issuance of an injunction.

16. This application is made by order to show cause rather than by motion in ordinary course because Mr. Kaiser is now scheduled to give further deposition testimony on Wednesday, November 2, and Friday, November 4.

17. Except for the motion described above in the Eastern District of New York to stay the deposition of Mr. Kaiser, no application for this or similar relief has been made to [fol. 275] any court or judge.

Marvin Schwartz

Sworn to before me this 1st day of November, 1966.

Anne Marie Pfeifer, Notary Public, State of New York, Residing in Kings County, Kings Co. Clk's No. 24-8351750, Certificate Filed in New York Co. Clk's, Commission Expires March 30, 1968.

[fol. 276]

EXHIBIT 1 TO AFFIDAVIT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action—File No.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco Inc., Plaintiff,

—against—

LYBRAND, ROSS BROS. & MONTGOMERY, MEADOW BROOK NATIONAL BANK AND HAROLD ROTH, Defendants.

COMPLAINT

The plaintiff, Irving L. Wharton, as Trustee in proceedings for the reorganization of Continental Vending Machine Corp. and Continental Apco Inc., by Christy, Bauman & Christy, his attorneys, for his complaint herein respectfully alleges:

A1.1 Continental Vending Machine Corp. (Continental) is an Indiana corporation with an office for the transaction

of business at 220 Hillside Avenue, Williston Park, New York. At all relevant times, Continental had an office for the transaction of business at 956 Brush Hollow Road, Westbury, New York.

A1.2 Continental Apco Inc. (Apco), a New York corporation, is a wholly-owned subsidiary of Continental, and has an office for the transaction of business at 220 Hillside Avenue, Williston Park, New York. At all relevant times, Apco had an office for the transaction of business at 956 Brush Hollow Road, Westbury, New York.

A1.3 On July 12, 1963, the United States District Court for the Eastern District of New York granted an involuntary petition praying that Continental be reorganized pursuant to the provisions of Chapter X of the Bankruptcy Act, and appointed John P. Campbell and Irving L. Wharton, co-trustees of Continental. On October 10, 1963, the United States District Court for the Eastern District of New York granted an involuntary petition praying that Apco be reorganized pursuant to the provisions of Chapter X of the Bankruptcy Act, and appointed John P. Campbell and Irving L. Wharton co-trustees of Apco. John P. Campbell resigned as co-trustee with the approval of the United States District Court for the Eastern District of New York, by order dated September 14, 1964.

A1.4 Irving L. Wharton (Wharton), a citizen and resident of the State of New York, is the duly qualified and acting trustee of both Continental and Apco.

[fol. 277] DEFENDANTS

A2.1 Lybrand, Ross Bros. and Montgomery (Lybrand) is a partnership with an office for the transaction of business at 2 Broadway, New York, New York.

A2.2 Harold Roth is a citizen and resident of the State of New York, and during the times mentioned in this complaint, was either an officer or director of Continental, Apco and Valley Commercial Corporation (Valley) a New

York Corporation, and controlled and dominated both Continental and its subsidiaries, including Apco and Valley.

A2.3 Meadow Brook National Bank (Meadow Brook) is a national banking corporation incorporated under the laws of the United States with an office for the transaction of business at 60 Hempstead Avenue, West Hempstead, New York.

JURISDICTION

A3.1 Jurisdiction of this Court is based on §2a of the Bankruptcy Act, 11 U.S.C. §11a.

AS AND FOR A FIRST CLAIM FOR RELIEF

A4.1 At all times hereinafter mentioned, Continental was engaged in the manufacture, sales and service of coin-activated vending machines and through various subsidiaries and divisions operated coin-activated vending machine routes in various parts of the United States and in Canada; Continental was a publicly held corporation with securities registered on the American Stock Exchange, a national securities exchange; Apco was engaged in the purchase and sale of coin-activated vending machines.

A4.2 At all times hereinafter mentioned, Lybrand were public accountants and held themselves out to the general public as such, and as possessing the ordinary skill, ability and experience of public accountants in accounting matters. Lybrand held themselves out to the public as being specially qualified in the examination and auditing of accounts of business concerns and the preparation of financial statements and reports based on their examination and audit. Lybrand held themselves out to the public as independent certified public accountants who were professionally qualified to perform examinations and audits of the books, records and accounts of business concerns in accordance with generally accepted auditing standards and who were qualified to express professional opinions as to the value of financial statements and reports in fairly reflecting

the financial condition of business concerns, including publicly-owned corporations with securities listed on national securities exchanges. Lybrand held themselves out to the public as being familiar with generally accepted auditing standards and accounting principles and with the accounting practices, procedures and standards of the Securities and Exchange Commission. As accountants regularly rendering accounting services to publicly-owned corporations with securities registered on national securities exchanges, [fol. 278] Lybrand knew that financial statements and reports prepared by them on the basis of their audit and examination would be filed with the Securities and Exchange Commission and national securities exchanges pursuant to the statutes, rules and regulations of those bodies and would be distributed to stockholders, debenture holders, Indenture Trustee, creditors, potential creditors and lending institutions in order that the said persons be fully and accurately informed of the financial condition of the business concern for which Lybrand provided accounting services.

A4.3 On or prior to the 30th day of September in each of the years 1958, 1959, 1960, 1961 and 1962 Continental retained Lybrand, who, for hire, agreed to render specialized and regular accounting services for Continental and its subsidiaries; and for valuable considerations agreed to:

(a) Conduct an audit and examination of the books, records and accounts of Continental and its subsidiaries, and to inspect, check up, verify and correct said books, records and accounts and the transactions therein reported, including but not limited to those books, records and accounts showing or purporting to show a transaction resulting in a purported asset entitled: "Accounts Receivable. Valley Commercial Corporation".

(b) Based on said audit and examination, to prepare, assist in the preparation of and cause to be prepared, financial statements including Consolidated

Balance Sheets and Statements of Income, Earned Surplus, Retained Earnings and Capital Surplus (hereinafter sometimes referred to as "financial statements") for Continental and its subsidiaries.

(c) Render reports in which they would certify and warrant that they had conducted the above described audit and examination and in which they would render a professional opinion as to whether the aforesaid financial statements fairly presented the consolidated financial condition of Continental and its subsidiaries, and the consolidated results of their operations.

A4.4 Lybrand, in accepting said employment, agreed to perform said services in a thorough, proper, skillful and diligent manner, and further agreed to perform said services as independent certified public accountants employing generally accepted auditing standards and accounting principles sufficient for the following ends and purposes:

(a) That any errors, omissions, false and fictitious entries which might have occurred or been made in such books, records and accounts whether occurring accidentally or by reason of dishonest acts, might be promptly discovered and corrected and any loss thereby avoided, and also that Continental might know that all of its books, records and accounts correctly reflected the transactions described therein, including, but not limited to, the purported asset entitled "Accounts Re- [fol. 279] ceivable. Valley Commercial Corporation", and that there were no illegal, improper or unauthorized transactions.

(b) To provide audited financial statements and letters of professional opinion in order that Continental could fulfill its obligations to report fairly its consolidated financial condition and the consolidated results of its operations, to:

(1) Continental's stockholders;

(2) The Securities and Exchange Commission and national securities exchanges, pursuant to the requirements, rules and regulations of those bodies;

(3) For the years 1961 and 1962 to the Indenture Trustee and debenture holders pursuant to the statutes, rules and regulations under the Trust Indenture Act of 1939; and

(4) Creditors, potential creditors and lending institutions.

A4.5 On or before the 30th day of September in the years 1958, 1959, 1960, 1961 and 1962 and for a period of time following each of those dates, Lybrand purportedly conducted audits and examinations of the books, records and accounts of Continental and its subsidiaries at the offices of Continental at 956 Brush Hollow Road, Westbury, New York, within the Eastern District of New York, and elsewhere. On the basis of each of these alleged audits and examinations, Lybrand prepared, caused to be prepared and assisted in the preparation of financial statements and did tender letters over their signature in which they certified that they had conducted an audit and examination and in which they rendered a professional opinion that the above described financial statements fairly presented the true financial condition of Continental and its subsidiaries and the result of their operations for each of the said fiscal years. The said statements and opinion for the fiscal year ending on the 30th day of September, 1958, are attached hereto as an integral part hereof and marked "Exhibit A". The said statements and opinion for the fiscal year ending on the 30th day of September, 1960, are attached hereto as an integral part hereof and marked "Exhibit B". The said statements and opinion for the fiscal year ending on the 30th day of September, 1960, are attached hereto as an integral part hereof and marked "Exhibit C". The said statements and opinion for the year ending on the 30th day

of September, 1961, are attached hereto as an integral part hereof and marked "Exhibit D". The said statements and opinion for the fiscal year ending on the 30th day of September, 1962, are attached hereto as an integral part hereof and marked "Exhibit E".

A4.6 At the time Lybrand agreed to render accounting services for Continental and prior to their expression of opinions of the Continental financial statements for the fiscal years 1958, 1959, 1960, 1961 and 1962, Lybrand was informed by, and well knew that Continental intended to and would use and distribute said financial statements and opinions for the purposes of, including but not limited to, submission to stockholders, debenture holders and the Indenture Trustee, to creditors, potential creditors, persons [fol. 280] contemplating the sale or purchase of securities of Continental, and lending institutions and the Securities and Exchange Commission and national securities exchanges.

A4.7 During the period October 1, 1957, to April 8, 1963, Harold Roth and others, pursuant to a scheme, did dishonestly and fraudulently waste, embezzle, misappropriate and convert to their own use, assets belonging to Continental and its subsidiaries and made, or caused to be made, false, fictitious and erroneous entries in the books, records and accounts of Continental and its subsidiaries and omitted or caused to be omitted, entries which should have been made in the books, records and accounts of Continental and its subsidiaries.

A4.8 Pursuant to the aforesaid scheme, Harold Roth and others caused Continental to transfer approximately $18,000,000 of assets of Continental and its subsidiaries to Valley and thereafter, Harold Roth caused a like amount of funds to be transferred from Valley to the use and benefit of himself and others. In order to conceal the true nature of these transactions, Harold Roth and others made or caused to be made, false, fictitious and erroneous entries in the books, records and accounts of Continental and its sub-

sidiaries. These false, fictitious and erroneous entries were designed to make it appear: that the transfers of funds from Continental to Valley were made in connection with a valid business purpose of Continental and its subsidiaries; that the transfers of funds from Continental to Valley were authorized by the Board of Directors of Continental; that in return for said transfers, Continental received a valuable asset described on the books of Continental as "Accounts Receivable. Valley Commercial Corporation" and that this asset was adequately secured and realizable in full by Continental.

A4.9 In truth and in fact, the aforesaid transfers from Continental to Valley were not authorized by the Board of Directors of Continental; were not made in connection with a valid business purpose of Continental and were not adequately secured and realizable in full by Continental. The asset Continental received which was described on the books, records and accounts of Continental as "Accounts Receivable. Valley Commercial Corporation" was not a valuable asset. The transactions resulting in the purported asset was merely a vehicle whereby Harold Roth could fraudulently transfer approximately $18,000,000 of Continental's assets to the use and benefit of himself and others of which no more than approximately $13,000,000 was ever returned to Continental and its subsidiaries.

A4.10 Harold Roth and others made, or caused to be made, false, fictitious and erroneous entries in the books, records and accounts of Continental and its subsidiaries and omitted or caused to be omitted, entries which should have been made and entered in the said books, records and accounts, the result of which was falsely and fraudulently to overstate assets, understate liabilities, overstate earnings and understate losses of Continental and its subsidiaries, all for the following ends and purposes:

[fol. 281] (a) to sustain the market price of Continental's securities at falsely high prices, to the bene-

fit of Harold Roth and others, as sellers of and borrowers on said securities, and

(b) to conceal from Continental and its security holders, the Securities and Exchange Commission and national securities exchanges, the Indenture Trustee, creditors, potential creditors, lending institutions, purchasers and sellers and potential purchasers and sellers of Continental's securities, their breaches of fiduciary duties, acts of corporate mismanagement, waste, embezzlement, misappropriation and conversion of corporate assets and to conceal the schemes described in paragraphs A4.7, A4.8 and A4.9 of this complaint.

A4.11 Lybrand breached and wholly failed to perform their agreement to render auditing and accounting services in a thorough, proper, skillful and diligent manner, and as independent certified public accountants, to employ generally accepted auditing standards and accounting principles sufficient for the purposes of their employment for the fiscal year ending on the 30th day of September, 1958.

A4.12 An audit and examination of the books, records and accounts of Continental and its subsidiaries, if properly performed at the end of the fiscal year stated in the preceding paragraph, would have discovered the errors, omissions and false and fictitious entries in the books, records and accounts of Continental and its subsidiaries, and would have discovered the true nature of the transfers of funds of Continental to Valley as aforesaid, if such audit and examination had been performed in a thorough, proper, skillful and diligent manner, in accordance with generally accepted auditing standards and accounting principles.

A4.13 Lybrand further breached and wholly failed and refused to perform the terms and conditions of the said agreement on its part to be performed in that they were reckless, careless, unskilled and grossly negligent in the proper performance of said agreement, and contrary to the terms and conditions thereof either failed to audit and ex-

amine the books, records and accounts of Continental and its subsidiaries, and failed to investigate and verify the books, records and accounts of Continental and its subsidiaries, or permitted such investigation and verification to be made in an unskilled, careless, negligent and reckless manner, all contrary to the terms and conditions of said agreement.

A4.14 Lybrand further failed and refused to perform the terms and conditions of the said agreement on its part to be performed in that it was reckless, careless, unskilled and grossly negligent in the preparation and rendering of financial statements and letters of professional opinion. The financial statements and letter of professional opinion were grossly inaccurate and incorrect and failed to show the true financial condition of Continental and its subsidiaries and failed to show accurately the true nature of the aforesaid transactions between Continental and its subsidiaries and Valley for the said fiscal year and failed to [fol. 282] show that Harold Roth and others made or caused to be made false, fictitious and erroneous entries in the books, records and accounts of Continental and its subsidiaries and omitted or caused to be omitted entries which should have been made and entered in the books, records and accounts of Continental and its subsidiaries.

A4.15 Continental duly performed all the terms and conditions of the said agreement on its part to be performed.

A4.16 Because Lybrand failed to perform its agreement with Continental, the aforesaid scheme to defraud Continental by Harold Roth was not discovered. Continental relied on the financial statements and letter of professional opinion of Lybrand and kept Harold Roth in its employ and continued to permit him to have access to and control over the cash and other assets of Continental and its subsidiaries and continued to permit him to have access to and control over the books, records and accounts of Continental and its subsidiaries. Thereafter and during such continued

employment Harold Roth wasted, embezzled, misappropriated and converted to his own use assets belonging to Continental and its subsidiaries in the approximate amount of $18,000,000 of which no more than approximately $13,000,000 was ever returned to Continental and its subsidiaries.

A4.17 Had Lybrand discovered the aforesaid errors, omissions and false and fictitious entries made or caused to be made by Harold Roth, or the true nature of the transfers from Continental and its subsidiaries to Valley, and reported the true condition of Continental and its subsidiaries to Continental, its security holders, its creditors and the Securities and Exchange Commission, said persons would have been able to prevent Harold Roth from wasting, embezzling, misappropriating and converting to his own use the assets of Continental and its subsidiaries and they would have been able to recover from Harold Roth the amounts which Harold Roth had wasted, embezzled, misappropriated and converted to his own use and therefore Continental has been damaged in the approximate amount of $5,000,000 with interest from the respective dates of the wrongful acts of said Harold Roth, as may be shown upon the trial of this action.

A4.18 By reason of the foregoing, Continental, Continental's security holders, and Continental's creditors have suffered special damages in the amount of $25,000,000 by reason of the following:

(a) the stock of Continental was removed from listing on the American Stock Exchange and all trading in it was suspended by action of the Securities and Exchange Commission, and it declined in value;

(b) Continental and its subsidiaries were unable to meet their financial obligations and Continental defaulted on its debentures, and

(c) Continental was forced to commit acts of bankruptcy and was therefore forced to discontinue its valuable business.

[fol. 283] A4.19 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000 together with interest and costs.

AS AND FOR A SECOND CLAIM FOR RELIEF

A5.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.10 inclusive with the same force and effect as if fully set forth herein.

A5.2 Lybrand breached and wholly failed to perform their agreement to render auditing and accounting services in a thorough, proper, skillful and diligent manner, and as independent certified public accountants, to employ generally accepted auditing standards and accounting principles sufficient for the purpose of their employment for the fiscal year ending on the 30th day of September, 1959.

A5.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.12 through A4.18 inclusive with the same force and effect as if fully set forth herein.

A5.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A THIRD CLAIM FOR RELIEF

A6.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.10 inclusive with the same force and effect as if fully set forth herein.

A6.2 Lybrand breached and wholly failed to perform their agreement to render auditing and accounting services in a thorough, proper, skillful and diligent manner, and as independent certified public accountants, to employ generally accepted auditing standards and accounting principles sufficient for the purpose of their employment for the fiscal year ending on the 30th day of September, 1960.

A6.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.12 through A4.18 inclusive with the same force and effect as if fully set forth herein.

A6.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for A Fourth Claim for Relief

A7.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.10 inclusive with the same force and effect as if fully set forth herein.

A7.2 Lybrand breached and wholly failed to perform their agreement to render auditing and accounting services in a thorough, proper, skillful and diligent manner, and as independent certified public accountants, to employ generally accepted auditing standards and accounting principles sufficient for the purpose of their employment for the fiscal year ending on the 30th day of September, 1961.

[fol. 284] A7.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.12 through A4.18 inclusive with the same force and effect as if fully set forth herein.

A7.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for A Fifth Claim for Relief

A8.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.10 inclusive with the same force and effect as if fully set forth herein.

A8.2 Lybrand breached and wholly failed to perform their agreement to render auditing and accounting services in a thorough, proper, skillful and diligent manner, and as independent certified public accountants, to employ generally accepted auditing standards and accounting principles sufficient for the purpose of their employment for the fiscal year ending on the 30th day of September, 1962.

A8.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.12 through A4.18 inclusive with the same force and effect as if fully set forth herein.

A8.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for A Sixth Claim for Relief

A9.1 Plaintiff repeats and realleges each and every allegation of paragraphs A4.1 through A4.4 inclusive, with the same force and effect as if fully set forth herein.

A9.2 On or prior to the 30th day of September, 1958, Lybrand entered upon the performance of said agreement to render accounting services to Continental and its subsidiaries for the fiscal year ending on the 30th day of September, 1958. During the months of September through December, 1958 and January 1959, Lybrand undertook and purported to conduct an audit and examination of the books, records and accounts of Continental and its subsidiaries for the fiscal year ending September 30, 1958. At the conclusion of said audit and examination, Lybrand delivered to Continental a consolidated balance sheet, a related statement of income and earned surplus and a report in the form of a letter directed to the Board of Directors over the signatures of Lybrand. Upon receipt of these financial statements and report, Lybrand and Continental delivered and caused to be delivered said financial statements and report to Continental's security holders and creditors and filed the same with the Securities and Exchange Commission and national security exchanges. Said financial statements and report are attached hereto as "Exhibit A" and made an integral part hereof.

A9.3 By said financial statements and report and by the facts aforesaid, Lybrand represented and intended to rep- [fol. 285] resent that Lybrand had made a careful audit and examination of the books, records and accounts of Continental and its subsidiaries and that the consolidated balance sheet so prepared and certified by them fairly represented the actual financial condition of Continental, and

had been prepared by Lybrand as the result of careful and skillful audit and examination of the books, records and accounts of Continental, and that Continental was possessed of and owned the assets which were set forth as assets upon the said Exhibit and had no liabilities other than the liabilities set forth on said Exhibit; that the assets listed on the consolidated balance sheets were the results of authorized transactions connected with a valid business purpose and were adequately secured and realizable in full, except as set forth in said consolidated balance sheet; that the related statements of income and surplus so prepared and certified by Lybrand fairly presented the results of the operations of Continental and its subsidiaries, and that the operations of Continental and its subsidiaries, for the fiscal year then ended had resulted in the income and surplus as reported in said Exhibit.

A9.4 The representations, warranties and certifications contained in said Exhibit were false and fraudulent in the following respects:

1. The audit and examination of the accounting records of Continental was not made in accordance with generally accepted auditing standards and did not include tests of the accounting records and other auditing procedures necessary under the circumstances and was, in fact, negligently, carelessly and recklessly made in that there were false, fictitious and erroneous entries in the books, records and accounts of Continental and its subsidiaries which were not discovered by said audit and examination.

2. The consolidated balance sheet of Continental and its subsidiaries as of the last day of the said fiscal year did not fairly present the consolidated financial position of Continental as of that day in conformity with generally accepted accounting principles applied on a consistent basis, in that it set forth the results of certain transactions as unqualified assets which were in fact unauthorized and unconnected with a valid busi-

ness purpose, unsecured and not realizable in full. Further, said consolidated balance sheet grossly overstated assets, grossly understated liabilities and grossly overstated the net worth of Continental and its subsidiaries. Further, Continental did not own or possess certain of the assets as set forth on the consolidated balance sheet prepared by Lybrand.

3. The related statement of income and surplus for the said fiscal year did not fairly present the consolidated results of the operations of Continental and its subsidiaries for the said fiscal year in conformity with generally accepted accounting principles applied on a consistent basis in that said statement of income and surplus grossly overstated income and surplus for the said fiscal year.

[fol. 286] A9.5 Plaintiff repeats and realleges each and every allegation of paragraphs A4.7 through A4.10 inclusive with the same force and effect as if fully set forth herein.

A9.6 Continental, its stockholders, its security holders, its creditors, and the Securities and Exchange Commission relied on the professional opinion of Lybrand and allowed Harold Roth to remain in control of Continental and its subsidiaries and continued to permit him to have access to and control over the cash and other assets of Continental and continued to permit him to have access to and control over the books, records and accounts of Continental. Thereafter and during such continued employment Harold Roth wasted, embezzled, misappropriated and converted to his own use assets belonging to Continental in an approximate amount of $18,000,000 of which no more than approximately $13,000,000 was ever returned to Continental and its subsidiaries.

A9.7 Had Lybrand discovered the aforesaid errors, omissions and false and fictitious entries made or caused

to be made by Harold Roth, or the true nature of the transfers from Continental and its subsidiaries to Valley, and reported the true condition of Continental and its subsidiaries to Continental, its security holders, its creditors, and the Securities and Exchange Commission, said persons would have been able to prevent Harold Roth from wasting, embezzling, misappropriating and converting to his own use the assets of Continental and its subsidiaries and they would have been able to recover from Harold Roth the amounts which Harold Roth had wasted, embezzled, misappropriated and converted to his own use, therefore Continental has been damaged in the approximate amount of $5,000,000, with interest, from the respective dates of the wrongful acts of said Harold Roth, as may be shown upon the trial of this action.

A9.8 By reason of the foregoing, Continental, Continental's security holders, and Continental's creditors have suffered special damages in the amount of $25,000,000 by reason of the following:

(a) the stock of Continental was removed from listing on the American Stock Exchange and all trading in it was suspended by action of the Securities and Exchange Commission,

(b) Continental and its subsidiaries were unable to meet their financial obligations and Continental defaulted on its debentures, and

(c) Continental was forced to commit acts of bankruptcy and was thereafter forced to discontinue its valuable business.

A9.9 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A SEVENTH CLAIM FOR RELIEF

A10.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive with the same force and effect as if fully set forth herein.

[fol. 287] A10.2 On or prior to the 30th day of September 1959, Lybrand entered upon the performance of said agreement to render accounting services to Continental and its subsidiaries for the fiscal year ending on the 30th day of September 1959. During the months of September through December, 1959 and January, 1960, Lybrand undertook and purported to conduct an audit and examination of the books, records and accounts of Continental and its subsidiaries for the fiscal year ending September 30, 1959. At the conclusion of said audit and examination, Lybrand delivered to Continental a consolidated balance sheet, a related statement of income and earned surplus and a report in the form of a letter directed to the Board of Directors over the signatures of Lybrand. Upon receipt of these financial statements and report, Lybrand and Continental delivered and caused to be delivered said financial statements and report to Continental's security holders and creditors and filed the same with the Securities and Exchange Commission and national security exchanges. Said financial statements and report are attached hereto as "Exhibit B" and made an integral part hereof.

A10.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A9.3 through A9.8 inclusive with the same force and effect as if fully set forth herein.

A10.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR AN EIGHTH CLAIM FOR RELIEF

A11.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive with the same force and effect as if fully set forth herein.

A11.2 On or prior to the 30th day of September 1960, Lybrand entered upon the performance of said agreement to render accounting services to Continental and its subsidiaries for the fiscal year ending on the 30th day of September 1960. During the months of September through December, 1960 and January, 1961, Lybrand undertook and purported to conduct an audit and examination of the books, records and accounts of Continental and its subsidiaries for the fiscal year ending September 30, 1960. At the conclusion of said audit and examination, Lybrand delivered to Continental a consolidated balance sheet, a related statement of income and earned surplus and a report in the form of a letter directed to the Board of Directors, over the signatures of Lybrand. Upon receipt of these financial statements and report, Lybrand and Continental delivered and caused to be delivered said financial statements and report to Continental's security holders and creditors and filed the same with the Securities and Exchange Commission and national security exchanges. Said financial statements and report are attached hereto as "Exhibit C" and made an integral part hereof.

A11.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A9.3 through A9.8 inclusive with the same force and effect as if fully set forth herein.

[fol. 288] A11.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for A Ninth Claim for Relief

A12.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive with the same force and effect as if fully set forth herein.

A12.2 On or prior to the 30th day of September 1961, Lybrand entered upon the performance of said agreement to render accounting services to Continental and its subsidiaries for the fiscal year ending on the 30th day of Sep-

tember 1961. During the months of September through December 1961 and January 1962, Lybrand undertook and purported to conduct an audit and examination of the books, records and accounts of Continental and its subsidiaries for the fiscal year ending September 30, 1961. At the conclusion of said audit and examination, Lybrand delivered to Continental a consolidated balance sheet, a related statement of income, retained earnings and capital surplus and a report in the form of a letter directed to the Board of Directors, over the signatures of Lybrand. Upon receipt of these financial statements and report, Lybrand and Continental delivered and caused to be delivered said financial statements and report to Continental's security holders and creditors and filed the same with the Securities and Exchange Commission and national security exchanges. Said financial statements and report are attached hereto as "Exhibit D" and made an integral part hereof.

A12.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A9.3 through A9.8 inclusive with the same force and effect as if fully set forth herein.

A12.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A TENTH CLAIM FOR RELIEF

A13.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive with the same force and effect as if fully set forth herein.

A13.2 On or prior to the 30th day of September 1962, Lybrand entered upon the performance of said agreement to render accounting services to Continental and its subsidiaries for the fiscal year ending on the 30th day of September 1962. During the months of September through December 1962 and January 1963, Lybrand undertook and purported to conduct an audit and examination of the books, records and accounts of Continental and its sub-

sidiaries for the fiscal year ending September 30, 1962. At the conclusion of said audit and examination, Lybrand delivered to Continental a consolidated balance sheet, a related statement of income and retained earnings and a report in the form of a letter directed to the Board of Directors, over the signatures of Lybrand. Upon receipt [fol. 289] of these financial statements and report, Lybrand and Continental delivered and caused to be delivered said financial statements and report to Continental's security holders and creditors and filed the same with the Securities and Exchange Commission and national security exchanges. Said financial statements and report are attached hereto as "Exhibit E" and made an integral part hereof.

A13.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A9.3 through A9.8 inclusive with the same force and effect as if fully set forth herein.

A13.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for An Eleventh Claim for Relief

A14.1 Plaintiff repeats and realleges each and every allegation of paragraphs A4.1 through A4.4 inclusive, paragraphs A4.7 through A4.10 inclusive, and A9.2 through A9.3 inclusive, with the same force and effect as if fully set forth herein.

A14.2 Lybrand made said audit and examination for the fiscal year ending on the 30th day of September, 1958, including the verification and reconciliation, negligently, carelessly and recklessly, without due diligence and without the exercise of reasonable skill as public and expert accountants, in that Lybrand wholly failed to discover and report the errors, omissions and false and fictitious entries in the books, records and accounts of Continental and its subsidiaries, and wholly failed to discover and report the unauthorized transfers of cash or any of the wasting, em-

bezzling, misappropriating and converting of Harold Roth and his agents.

A14.3 Lybrand was further negligent, careless and reckless in preparing and submitting the said financial statements and reports, together with the representations and professional opinion therein contained. Lybrand at the time of the submission of said financial statements and report knew, or should have known, that the books, records and accounts of Continental and its subsidiaries were false and inaccurate and that the consolidated balance sheet did not fairly present the true financial condition of Continental and its subsidiaries, in that it set forth the results of certain transactions as unqualified assets, which transactions were, in fact, unauthorized, unconnected with a valid business purpose, unsecured and not realizable in full. Further, Lybrand knew or should have known that the said consolidated balance sheet grossly overstated assets and net worth of Continental and its subsidiaries, and grossly understated liabilities; and that the related statement of income and surplus for the said fiscal year did not fairly present the consolidated results of the operations of Continental and its subsidiaries for the said fiscal year, in that the said statement of income and surplus grossly overstated the income and surplus for the said fiscal year. The examination by Lybrand of the books, records and accounts of Continental was not made with reasonable care but was [fol. 290] recklessly made; and the said opinion of Lybrand was not based upon, nor the result of, an audit and examination conducted by Lybrand with reasonable care.

A14.4 The representations, warranties and professional opinion were recklessly and wantonly made by Lybrand; Lybrand either knew of their falsity or made and gave said representations, warranties and professional opinion without knowledge or without good faith opinion, as to their truth or falsity; Lybrand either knew that the consolidated balance sheet did not fairly present the financial condition of Continental as of the last day of the said fiscal year, or

knew that no sufficient examination or inquiry had been made by them to ascertain whether such consolidated balance sheet did fairly present the financial condition of Continental and its subsidiaries as of the last day of said fiscal year; Lybrand either knew that the related statement of income and surplus did not fairly present the results of the consolidated operations of Continental and its subsidiaries for the fiscal year then ended, or knew that no sufficient examination or inquiry had been made by them to ascertain whether said related statement of income and surplus did fairly present the consolidated results of the operations of Continental and its subsidiaries for the year then ended.

A14.5 Solely due to the negligence of Lybrand, Continental, its security holders, its creditors, and the Securities and Exchange Commission allowed Harold Roth to remain in control of Continental's and its subsidiaries' cash, records, books and accounts. Thereafter and during such continued employment, Harold Roth wasted, embezzled, misappropriated and converted to his own use monies belonging to Continental and its subsidiaries in the approximate amount of $18,000,000 of which no more than approximately $13,000,000 was ever returned to Continental and its subsidiaries.

A14.6 The losses sustained by Continental, its security holders and its creditors were solely due to the negligence and carelessness of Lybrand and were not due to any negligence on the part of Continental, its security holders or its creditors.

A14.7 Had Lybrand discovered the aforesaid errors, omissions and false and fictitious entries made or caused to be made by Harold Roth, or the true nature of the transfers from Continental to Valley, and reported the true condition of Continental and its subsidiaries to Continental, its security holders, its creditors, or the Securities and Exchange Commission, and national security exchanges said persons would have been able to prevent Harold Roth from wasting, embezzling, misappropriating and convert-

ing to his own use the assets of Continental and its subsidiaries and they would have been able to recover from Harold Roth, the amounts which Harold Roth had wasted, embezzled, misappropriated and converted to his own use and that therefore Continental has been damaged in the approximate amount of $5,000,000 with interest from the respective dates of the wrongful acts of said Harold Roth, as may be shown upon the trial of this action.

[fol. 291] A14.8 By reason of the foregoing, Continental, Continental's security holders, and Continental's creditors have suffered special damages in the amount of $25,000,000 by reason of the following:

(a) the stock of Continental was removed from listing on the American Stock Exchange and all trading in it was suspended by action of the Securities and Exchange Commission,

(b) Continental and its subsidiaries were unable to meet their financial obligations and Continental defaulted on its debentures, and

(c) Continental was forced to commits acts of bankruptcy and was thereafter forced to discontinue its valuable business.

A14.9 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A TWELFTH CLAIM FOR RELIEF

A15.1 Plaintiff repeats and realleges each every allegation of Paragraphs A4.1 through A4.4 inclusive, Paragraphs A4.7 through A4.10 inclusive, A10.2 and A9.3 with the same force and effect as if fully set forth herein.

A15.2 Lybrand made said audit and examination for the fiscal year ending on the 30th day of September, 1959, including the verification and reconciliation, negligently,

carelessly and recklessly, without due diligence and without the exercise of reasonable skill as public and expert accountants, in that Lybrand wholly failed to discover and report the errors, omissions and false and fictitious entries in the books, records and accounts of Continental and its subsidiaries, and wholly failed to discover and report the unauthorized transfers of cash or any of the wasting, embezzling, misappropriating and converting of Harold Roth and his agents.

A15.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A14.3 through A14.8 inclusive, with the same force and effect as if fully set forth herein.

A15.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A THIRTEENTH CLAIM FOR RELIEF

A16.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive, Paragraphs A4.7 through A4.10 inclusive and A11.2 and A9.3 with the same force and effect as if fully set forth herein.

A16.2 Lybrand made said audit and examination for the fiscal year ending on the 30th day of September, 1960, including the verification and reconciliation, negligently, carelessly and recklessly, without due diligence and without the exercise of reasonable skill as public and expert accountants, in that Lybrand wholly failed to discover and re- [fol. 292] port the errors, omissions and false and fictitious entries in the books, records and accounts of Continental and its subsidiaries, and wholly failed to discover and report the unauthorized transfers of cash or any of the wasting, embezzling, misappropriating and converting of Harold Roth and his agents.

A16.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A14.3 through A14.8 inclusive with the same force and effect as if fully set forth herein.

A16.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for A Fourteenth Claim for Relief

A17.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive, Paragraphs A4.7 through A4.10 inclusive and A12.2 and A9.3 with the same force and effect as if fully set forth herein.

A17.2 Lybrand made said audit and examination for the fiscal year ending on the 30th day of September, 1961, including the verification and reconciliation, negligently, carelessly and recklessly, without due diligence and without the exercise of reasonable skill as public and expert accountants, in that Lybrand wholly failed to discover and report the errors, omissions and false fictitious entries in the books, records and accounts of Continental and its subsidiaries, and wholly failed to discover and report the unauthorized transfers of cash or any of the wasting, embezzling, misappropriating and converting of Harold Roth and his agents.

A17.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A14.3 through A14.8 inclusive with the same force and effect as if fully set forth herein.

A17.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for A Fifteenth Claim for Relief

A18.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive Paragraphs A4.7 through A4.10 inclusive, A13.2 and A9.3, with the same force and effect as if fully set forth herein.

A18.2 Lybrand made said audit and examination for the fiscal year ending on the 30th day of September, 1962, in-

cluding the verification and reconciliation, negligently, carelessly and recklessly, without due diligence and without the exercise of reasonable skill as public and expert accountants, in that Lybrand wholly failed to discover and report the errors, omissions and false and fictitious entries in the books, records and accounts of Continental and its subsidiaries, and wholly failed to discover and report the unauthorized transfers of cash or any of the wasting, embezzling, misappropriating and converting of Harold Roth and his agents.

[fol. 293] A18.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A14.3 through A14.8 inclusive with the same force and effect as if fully set forth herein.

A18.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A SIXTEENTH CLAIM FOR RELIEF

A19.1 Plaintiff repeats and realleges each and every allegation of paragraphs A4.1 through A4.4 inclusive, paragraphs A9.2 and A9.3 inclusive, and paragraphs A4.7 through A4.10 inclusive, with the same force and effect as if fully set forth herein.

A19.2 The financial statements and representations for the fiscal year ending on the 30th day of September, 1958 were made by Lybrand to Continental, its security holders, its creditors, lending institutions, the Securities and Exchange Commission and national securities exchanges with the intent to induce Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges to act thereon, and with the further intent to deceive and defraud Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges and said financial statements and representations were false and fraudulent at the time they were made.

A19.3 The said financial statements and representations were made by Lybrand without having knowledge whether the same were true or false, and without any reasonable grounds to believe the same to be true, and with reckless disregard for the injury which might thereafter be caused Continental, its security holders and creditors; and further, Lybrand made the aforesaid financial statements and representations at a time when Lybrand was then informed and knew facts and circumstances sufficient to cause Lybrand to suspect the falsity thereof, which facts and circumstances were unknown to any member of Continental not in conspiracy with Harold Roth, and which facts and circumstances were unknown to the security holders, creditors and lending institutions of Continental and unknown to the Securities and Exchange Commission and national securities exchanges, and that such financial statements and representations were made by Lybrand with the intent that Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges should act in reliance thereon.

A19.4 Subsequent to the last preceding audit and examination of the books, records and accounts of Continental and its subsidiaries and prior to the date as to which the aforesaid financial statements and professional opinion were rendered, Harold Roth and others dishonestly and fraudulently wasted, embezzled, misappropriated and converted to their own use, monies belonging to Continental and its subsidiaries, and made or caused to be made, false, fictitious and erroneous entries in the books, records, and accounts [fol. 294] of Continental and its subsidiaries and omitted or caused to be omitted entries which should have been made in such books, records, and accounts.

A19.5 Continental, its security holders, its creditors, and the Securities and Exchange Commission relied on the aforesaid financial statements and report and representations and believed the same to be true and were thereby induced to and did allow Harold Roth to remain in control

of Continental and its subsidiaries and continued to permit him to have access to and control over Continental's and its subsidiaries' cash, records, books and accounts. That thereafter, and during such continued employment, Harold Roth and his agents wasted, embezzled, misappropriated and converted to their own use, monies belonging to Continental in the approximate amount of $18,000,000 of which no more than approximately $13,000,000 was ever returned to Continental and its subsidiaries.

A19.6 Had Lybrand discovered the aforesaid errors, omissions or false entries made or caused to be made by Harold Roth, or the true nature of the transfers from Continental to Valley, and reported the true condition of Continental and its subsidiaries to Continental, its security holders, its creditors, the Securities and Exchange Commission said persons would have been able to prevent Harold Roth from wasting, embezzling, misappropriating or converting to his own use the assets of Continental and its subsidiaries, and they would have been able to recover from Harold Roth the amounts which Harold Roth had wasted, embezzled, misappropriated or converted to their own use, and therefore Continental has been damaged in the approximate amount of $5,000,000 with interest, from the respective dates of the wrongful acts of said Harold Roth, as may be shown upon the trial of this action.

A19.7 By reason of the foregoing, Continental, Continental's security holders, and Continental's creditors have suffered special damages in the amount of $25,000,000 by reason of the following:

(a) the stock of Continental was removed from listing on the American Stock Exchange and all trading in it was suspended by action of the Securities and Exchange Commission,

(b) Continental and its subsidiaries were unable to meet their financial obligations and Continental defaulted on its debentures, and

(c) Continental was forced to commit acts of bankruptcy and was thereafter forced to discontinue its valuable business.

A19.8 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A SEVENTEENTH CLAIM FOR RELIEF

A20.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive, Paragraphs A4.7 through A4.10 inclusive and Paragraphs A10.2 and A9.3 with the same force and effect as if fully set forth herein.

[fol. 295] A20.2 The financial statements and representations for the fiscal year ending on the 30th day of September, 1959 were made by Lybrand to Continental, its security holders, its creditors, lending institutions, the Securities and Exchange Commission and national securities exchanges with the intent to induce Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges to act thereon, and with the further intent to deceive and defraud Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges and said financial statements and representations were false and fraudulent at the time they were made.

A20.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A19.3 through A19.7 inclusive with the same force and effect as if fully set forth herein.

A20.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for An Eighteenth Claim for Relief

A21.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive, Paragraphs A4.7 through A4.10 inclusive and Paragraphs A11.2 and A9.3 with the same force and effect as if fully set forth herein.

A21.2 The financial statements and representations for the fiscal year ending on the 30th day of September, 1960 were made by Lybrand to Continental, its security holders, its creditors, lending institutions, the Securities and Exchange Commission and national securities exchanges with the intent to induce Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges to act thereon, and with the further intent to deceive and defraud Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges and said financial statements and representations were false and fraudulent at the time they were made.

A21.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A19.3 through A19.7 inclusive with the same force and effect as if fully set forth herein.

A21.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

As And for A Nineteenth Claim for Relief

A22.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive, Paragraphs A4.7 through A4.10 inclusive and Paragraph A12.2 and A9.3 with the same force and effect as if fully set forth herein.

A22.2 The financial statements and representations for the fiscal year ending on the 30th day of September, 1961 [fol. 296] were made by Lybrand to Continental, its security holders, its creditors, lending institutions, the Securities

and Exchange Commission and national securities exchanges with the intent to induce Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges to act thereon, and with the further intent to deceive and defraud Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges and said financial statements and representations were false and fraudulent at the time they were made.

A22.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A19.3 through A19.7 inclusive with the same force and effect as if fully set forth herein.

A22.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A TWENTIETH CLAIM FOR RELIEF

A23.1 Plaintiff repeats and realleges each and every allegation of Paragraphs A4.1 through A4.4 inclusive, Paragraphs A4.7 through A4.10 inclusive and Paragraph A13.2 and A9.3 with the same force and effect as if fully set forth herein.

A23.2 The financial statements and representations for the fiscal year ending on the 30th day of September, 1962 were made by Lybrand to Continental, its security holders, its creditors, lending institutions, the Securities and Exchange Commission and national securities exchanges with the intent to induce Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges to act thereon, and with the further intent to deceive and defraud Continental, its security holders, its creditors, the Securities and Exchange Commission and national securities exchanges and said financial statements and representations were false and fraudulent at the time they were made.

A23.3 Plaintiff repeats and realleges each and every allegation of Paragraphs A19.3 through A19.7 inclusive with the same force and effect as if fully set forth herein.

A23.4 Wherefore, plaintiff demands judgment against Lybrand in the amount of $30,000,000, together with interest and costs.

AS AND FOR A TWENTY-FIRST CLAIM FOR RELIEF

A24.1 During the period of approximately June 1958 through and including April 8, 1963, Harold Roth and his agents in breach of their fiduciary duties and obligations as directors and officers of Continental and its subsidiaries, individually and in conspiracy with one another and in conspiracy with certain other firms, corporations and individuals, including Lybrand and Meadow Brook unlawfully and with fraudulent intent conspired and connived to defraud Continental as well as Continental's securities holders, creditors, and the Indenture Trustee and the Securities and Exchange Commission and national securities [fol. 297] exchanges and to that end employed a continuing device, scheme and artifice by which they were able to despoil Continental of its assets and dispose of the same to the benefit and profit of Harold Roth and his agents.

A24.2 In pursuance of said continuing scheme to defraud, Harold Roth and his agents between June 1958 through April 8, 1963, wasted, embezzled, misappropriated and converted approximately $5,000,000 of Continental's cash to their own use and benefit.

A24.3 In pursuance of said continuing scheme to defraud and in order to conceal the same and to conceal the waste, embezzlement, misappropriation and conversion of Continental's cash and Continental's assets, Harold Roth and his agents from time to time during the period from June 1958 to April 8, 1963, transferred and caused the transfer of approximately $18,000,000 of Continental's cash to Valley, a corporation dominated and controlled by Harold

Roth, and transferred or caused the transfer of a like amount of cash from Valley to the use and benefit of Harold Roth and his agents.

A24.4 In pursuance of said continuing scheme to defraud and in order to conceal the same, Harold Roth and his agents from time to time during the period from June 1958 to April 8, 1963, replaced a portion of the cash transferred from Continental to Valley. This replacement was disguised as a repayment from Valley to Continental for purported loans. During the period from approximately June 1958 through April 8, 1963, Harold Roth and his agents replaced no more than approximately $13,000,000 of Continental's cash.

A24.5 In pursuance of said continuing scheme to defraud and in order to conceal the same, Harold Roth and his agents caused Continental to enter the above described transfers and replacements of its cash on Continental's books in the form of an open account transaction between Continental and Valley. At the end of each fiscal year during said period, Harold Roth and his agents reported the balance in Continental's favor on the so-called open account as an unqualified asset of Continental's, fully secured and realizable in full. Harold Roth and his agents represented that the transactions in the so-called open account were authorized transactions which were connected with a valid business purpose of Continental.

A24.6 The transactions described in paragraphs A24.1 through A24.5 were unauthorized transactions and unconnected with any valid business purpose of Continental's. The balance in Continental's favor on the so-called open account with Valley was unsecured and not realizable in full; the entire transaction was part of a continuing scheme and device whereby Harold Roth and his agents could despoil Continental of its assets and employ Continental's cash for the use and benefit of Harold Roth and his agents.

A24.7 As a result of the continuing despoiling, wasting, embezzling, misappropriating and conversion of Continen-

tal's cash by Harold Roth and his agents from on or about August 1962 until April 8, 1963, Continental had a cash deficit of approximately $1,300,000. As of August 1962 the [fol. 298] balance in the so-called open account between Continental and Valley was in excess of $3,000,000.

A24.8 In pursuance of said continuing scheme to defraud and to conceal the same and to conceal the said cash deficit on the year end financial statements for the fiscal year ending September 30, 1962, Harold Roth and his agents entered into agreements with Meadow Brook and other lending institutions (hereinafter referred to as the "Meadow Brook Group").

A24.9 Pursuant to said agreement with Harold Roth and his agents and pursuant to the continuing scheme to defraud and in order to conceal the same, the Meadow Brook Group purported to transfer $1,500,000 to Continental in the form of credits to Continental's various bank accounts with the Meadow Brook Group. $750,000 of this amount was purportedly transferred by Meadow Brook to Continental's account at Meadow Brook.

A24.10 The purported transfers of $1,500,000 were made in the guise of a loan to Continental by the Meadow Brook Group. Meadow Brook purportedly loaned Continental $750,000 of the total amount. The purported loans were made on September 26, 1962 and purportedly repaid by Continental on October 26, 1962.

A24.11 The $1,500,000, including the $750,000 supplied by Meadow Brook, was never transferred to an account from which Continental could draw upon it, nor was it ever intended that the funds be made available to Continental.

A24.12 Pursuant to said agreement and pursuant to the continuing scheme to defraud and to conceal Continental's cash deficit position, at one or more times in the period between September 26, 1962 and October 26, 1962, Meadow Brook Group informed Lybrand and others that Continental's bank balances with the Meadow Brook Group were

sums that included the purported loan of $1,500,000; that the $1,500,000, including the $750,000 purportedly supplied by Meadow Brook, was subject to withdrawal by check and that the loans which purportedly supplied the $1,500,000 were unsecured.

A24.13 The accounts to which the $1,500,000 were credited, including the account to which Meadow Brook purportedly credited the $750,000, were impressed and blocked accounts; the funds therein were not subject to withdrawal by check or otherwise by Continental and the funds constituted the security for the purported loan.

A24.14 The misrepresentations and concealments of the Meadow Brook Group were made for the purpose and intent of assisting Harold Roth and his agents and Lybrand to prepare, publish and distribute financial statements reflecting the purported $1,500,000, including the $750,000 supplied by Meadow Brook, as an unrestricted asset of Continental. The entire transaction was designed and intended to create an appearance of a substantial asset existing in favor of Continental where in fact no such asset existed. The entire transaction was designed and intended to assist Harold Roth and his agents and Lybrand in con- [fol. 299] cealing Continental's cash deficit of $1,300,000 and to assist Harold Roth and his agents and Lybrand in reporting a cash balance on the financial statements for the fiscal year ending on September 30, 1962.

A24.15 Pursuant to said continuing scheme to defraud and in order to conceal the same, Harold Roth and his agents in conspiracy with Lybrand, prepared, published and distributed financial statements of Continental for the fiscal years 1958, 1959, 1960, 1961 and 1962 which were false and fraudulent in that they concealed the true financial condition of Continental; they concealed the true nature of the cash transfers from Continental to Valley and they presented a gross overstatement of Continental's financial position.

A24.16 Lybrand, Continental's auditors, together with Harold Roth and his agents, reported in said financial statements the balance in Continental's favor on the so-called open account with Valley as an unqualified asset, fully secured and realizable in full. In said financial statements Lybrand knowingly concealed the fact that the transactions resulting in cash transfers and replacements of cash between Continental and Valley were unauthorized by the Board of Directors of Continental and unconnected with any valid business purpose of Continental's. In said financial statements Lybrand knowingly concealed the fact that Harold Roth and his agents had taken the money from Valley after it had been transferred from Continental and that Harold Roth and his agents were unable to repay either Valley or Continental. In said financial statements Lybrand knowingly concealed the fact that Valley was unable to repay Continental. Further, in order to assist Harold Roth in concealing Continental's true financial position, Lybrand in each of the fiscal years referred to above prepared and certified financial statements which grossly overstated Continental's financial position.

A24.17 The aforesaid false and fraudulent financial statements were prepared, published and distributed by Lybrand and Harold Roth and his agents in order to conceal the facts from Continental, Continental's securities holders, Indenture Trustee, creditors, the Securities and Exchange Commission and national securities exchanges and to enable Harold Roth to continue to control and dominate Continental and to continue to have access aand control over Continental's cash and other assets and Continental's books and records.

A24.18 As a result of the above described continuing scheme to defraud and of the concealments and misrepresentations of Harold Roth, his agents, Lybrand and Meadow Brook, Harold Roth and his agents between June 1958 and April 1963 were able to waste, embezzle, misappropriate and convert to their own use and benefit approximately $5,000,000 of Continental's cash.

A24.19 As a result of the concealments and misrepresentations of Harold Roth, his agents, Lybrand, Meadow Brook and others, Continental, its officers and directors not in conspiracy with Harold Roth, Continental's securities holders, creditors and the Securities and Exchange Commission could take no steps to stop the despoiling of Con- [fol. 300] tinental's assets by Harold Roth and his agents and could take no steps to recover the monies so misappropriated, wasted, embezzled and converted to the use and benefit of Harold Roth and his agents and therefore Continental has been damaged in the approximate amount of $5,000,000 with interest from the respective dates of the wrongful acts of Harold Roth and his agents as may be shown on the trial of this action.

A24.20 As a result of the aforesaid continuing scheme to defraud, Continental was damaged in the amount of $7,500 representing the amounts paid by Continental to the Meadow Brook Group in the form of interest for the purported loan of $1,500,000, $3,750 of which was paid by Continental to Meadow Brook.

A24.21 By reason of the foregoing, creditors of Continental and Apco were damaged in that they reasonably extended credit in reliance upon the misrepresentations, concealments and false statements by the defendants in the amount of $11,000,000.

A24.22 By reason of the foregoing, Continental, Continental's securities holders and Continental's creditors have suffered special damages in the amount of $25,000,000 by reason of the following:

(a) the stock of Continental was removed from listing on the American Stock Exchange, and all trading in it was suspended by action of the Securities and Exchange Commission and it declined in value,

(b) Continental and its subsidiaries were unable to meet their financial obligations and Continental was forced to default on its debentures, and

(c) Continental was forced to commit acts of bankruptcy and was thereafter forced to discontinue its valuable business.

A24.23 Wherefore, plaintiff demands judgment as follows:

against Harold Roth, Lybrand and Meadow Brook jointly and severally in the amount of $41,000,000;

against Harold Roth and Meadow Brook jointly and severally in the amount of $7,500.

DEMAND FOR JUDGMENT

Wherefore, plaintiff demands judgment as demanded in each of the Claims For Relief alleged herein, and for such other, further and different relief as to this Court may seem just.

CHRISTY, BAUMAN & CHRISTY

by .....
a member of the firm
30 Rockefeller Plaza
New York, N. Y. 10020

Dated: New York, New York
June , 1965

EXHIBIT A TO EXHIBIT 1

(See opposite) ☞

REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS

To the Board of Directors,
Continental Industries, Inc.:

We have examined the consolidated balance sheet of CONTINENTAL INDUSTRIES, INC. and its Subsidiaries as of September 30, 1958 and the related statement of income and earned surplus for the fiscal year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances; however, it was not practicable to make physical tests of inventories of merchandise in vending machines, although we have satisfied ourselves as to such inventories by means of other auditing procedures.

In our opinion, the accompanying consolidated balance sheet and the related statement of income and earned surplus present fairly the consolidated financial position of Continental Industries, Inc. and its Subsidiaries at September 30, 1958, and the consolidated results of their operations for the fiscal year then ended, in conformity with generally accepted accounting principles applied on a consistent basis, except for the change described in Note 4 to the consolidated financial statements, with which change we concur.

LYBRAND, ROSS BROS. & MONTGOMERY

Lybrand, Ross Bros. & Montgomery

New York, January 14, 1959.

[fol. 301]

EXHIBIT A TO EXHIBIT 1

CONSOLIDATED BALANCE SHEET

SEPTEMBER 30, 1958

Continental
INDUSTRIES·INC. AND ITS SUBSIDIARIES

ASSETS:

Current assets:		
Cash		$ 313,944
Accounts and notes receivable, trade	$ 800,653	
Other receivables (Note 3), including $36,269 from an affiliate	999,327	
	1,799,980	
Less, Allowance for doubtful accounts	26,211	1,773,769
Inventories, at lower of cost or market (Note 2)		2,041,549
Prepaid expenses		1,647,977
Total current assets		5,777,239
Mortgage receivable (noninterest-bearing, due December 1, 1974)		200,000
Property, plant and equipment (Notes 3 and 7):		
Vending machines	8,266,872	
Other, principally buildings, machinery and equipment	1,652,359	
	9,919,231	
Less, Reserve for depreciation	2,893,811	
	7,025,420	
Land	35,725	7,061,145
Nonoperating property	392,150	
Less, Reserve for depreciation	222,281	169,869
Deferred charges and other assets:		
Research and development	376,196	
Deferred accounts receivable	83,255	
Other	1,098,197	1,557,648
		$14,765,901

The accompanying notes are an integral part of the financial statements.

LIABILITIES:

Current liabilities:		
Notes and mortgages payable, other than to affiliate, instalments due within one year (Note 5):		
Notes:		
Bank	$1,350,000	
Others	1,855,377	
Mortgages	17,287	$ 3,222,664
Accounts payable		2,063,585
Valley Commercial Corp., affiliate:		
Notes payable, instalments due within one year (Note 6)	524,034	
Account	116,202	640,236
Accrued expenses and taxes:		
Federal income tax	353,955	
Other	417,214	771,169
Total current liabilities		6,697,654
Notes and mortgages payable, other than to affiliate, instalments due after one year (Note 5):		
Notes	2,082,489	
Mortgages	31,458	2,113,947
Valley Commercial Corp., affiliate, notes payable, instalments due after one year (Note 6)		317,810
Deferred federal income tax (Note 3)		173,000
Contingent liabilities (Notes 7 and 11)		

CAPITAL:

Capital stock (Note 8):		
Common, par value $.10 a share; 4,000,000 shares authorized, 1,516,136 shares issued	151,614	
Class B, par value $1.00 a share; 201,997 shares authorized and issued	201,997	
Paid-in surplus (Note 9)	3,586,145	
Earned surplus, of annexed	1,523,734	5,463,490
		$14,765,901

The accompanying notes are an integral part of the financial statements.

CONSOLIDATED STATEMENT OF INCOME AND EARNED SURPLUS

for the fiscal year ended September 30, 1958

Continental INDUSTRIES, INC. AND ITS SUBSIDIARIES

Sales and operating income		$23,920,311
Cost of sales		16,009,672
		7,910,639
Selling and administrative expenses		5,642,205
		2,268,434
Depreciation and amortization		922,915
		1,345,519
Other deductions, principally interest	$541,174	
Other income, including profits of $470,946 from sales of vending machines and other capital assets (Note 3)	537,671	3,503
Income before provision for federal income taxes		1,342,016
Provision for federal income taxes (Notes 3 and 10)		333,468
Net income (Note 4)		1,008,548
Earned surplus, September 30, 1957		515,186
Earned surplus, September 30, 1958		$ 1,523,734

The accompanying notes are an integral part of the financial statements.

[fol. 303]

EXHIBIT A - Page 3 of 4

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

1. The consolidated financial statements of Continental Industries, Inc. include the accounts of all of its subsidiaries (all wholly-owned) at September 30, 1958, and for the year then ended.

2. Inventories include merchandise for sale through vending machines, manufacturing finished stock, raw materials and work in process, and supplies. The inventories are recorded generally at cost, on an average or first-in, first-out basis, which amounts were not in excess of replacement market at September 30, 1958.

3. Property, plant and equipment are recorded generally at cost, reduced by the proceeds of occasional sales of used vending machines. Cost, as applied to vending machines, includes the purchase price of such machines acquired as a group in operating locations together with an amount, $322,632, representing the excess of the aggregate cost of investments in certain subsidiaries over the related net assets of such subsidiaries at dates of acquisition. Such amount is recorded as cost of vending machines since trade practice in arriving at the purchase price for groups of such machines in operating locations is, in most instances, the same whether the machines are purchased directly or the capital stock of a company operating the machines is purchased. Vending machines include equipment (sold under conditional sales contracts, see Note 7) which in effect is pledged as collateral security for certain notes payable and equipment subject to chattel mortgages as collateral for unpaid purchase prices. Other properties, including nonoperating properties, are subject to mortgages payable.

The aggregate recorded amount of property subject to such liens is $3,880,000 and the aggregate unpaid notes and mortgages is $3,788,877.

Prior to September 30, 1958, the Company negotiated agreements for the sale of a group of vending machines in operating locations. The net effect of these transactions, which were consummated prior to October 17, 1958, is reflected in the consolidated financial statements at September 30, 1958 by recording the sales price of $765,600 (less $75,000 advance payment) in other receivables and the profit of $435,070, exclusive of the related provisions for taxes, in other income.

The Company and its subsidiaries depreciate the cost of vending machines for corporate accounting purposes over an estimated service life which exceeds that used for income tax purposes. An amount equivalent to the resulting tax reduction of $173,000 in the fiscal year ended September 30, 1958 has been charged to income and credited to a liability for deferred federal income tax.

4. During the fiscal year ended September 30, 1958 the Company adopted a policy of capitalizing costs of installing vending machines and certain other items which, in prior periods, had been charged to income when the disbursements were made. As a result of this change in practice, consolidated net income for such fiscal year is approximately $270,000 greater than it would have been had the change not been made.

5. Notes and mortgages payable other than to affiliate:

	Instalments Due Within One Year	Instalments Due After One Year
Bank notes, unsecured:		
Payable in monthly instalments of $75,000 to January, 1959 and $100,000 thereafter, interest payable monthly in advance at 5½ per cent a year	$1,050,000	
Payable October 23, 1958, interest payable monthly in advance at 6 per cent a year	300,000	
	$1,350,000	
Other notes, payable in varying monthly amounts from $388,562 in October, 1958 to $107,506 in September, 1959 and from $100,456 in October, 1959 to $1,539 in May, 1963; interest paid in advance at 6 per cent a year on approximately $3,765,000, current interest payable at various rates on approximately $193,000:		
Secured (see Notes 3 and 7)	$1,727,143	$2,012,989
Unsecured	128,234	69,500
	$1,855,377	$2,082,489
Mortgages, payable in varying monthly amounts including interest	$ 17,287	$ 31,458
Totals	$3,222,664	$2,113,947

6. Valley Commercial Corp., affiliate:

	Instalments Due Within One Year	Instalments Due After One Year
Notes, unsecured, payable in varying monthly amounts from $84,762 in October, 1958 to $25,952 in September, 1959 and from $16,202 in October, 1959 to $3,466 in September, 1961; interest paid in advance at 6 per cent a year on approximately $833,000, current interest payable at 12 per cent on $9,000	$524,034	$317,810

7. The Company follows the practice of discounting customers' notes, including those of subsidiary companies, arising from the sale of vending machines under conditional sales contracts. Under the terms of such contracts, title to the machines remains in the seller as security for the notes until the notes are fully paid. The conditional sales contracts are assigned by the Company to certain financial organizations as collateral security for the discounted notes. In addition to discounting customers' notes, the Company and its subsidiaries sell or assign unsecured customers' accounts to obtain additional financing. At September 30, 1958 the Company and its subsidiaries were contingently liable in the approximate amount of $2,900,000 in connection with accounts sold or assigned and notes discounted.

An annual rental of $107,125 is payable for a period of twenty-five years from November 1, 1957, on property leased by the Company at Westbury, New York. Under renewal options such annual rental is reduced to $53,562. The Company has a contingent liability of approximately $531,000 as guarantor of a first mortgage on such property.

8. In the event of liquidation of the Company, voluntary or involuntary, the common stock shall be entitled to a "liquidation preference" equal to $1.20 a share less the amount of any dividends declared or paid with respect to shares of common stock outstanding on August 31, 1956. After such "liquidation preference" the common stock and Class B stock shall share in liquidation on the basis of 1¢ for each share of common stock for every 10¢ for each share of Class B stock. Prior to September 30, 1957 cash dividends aggregating 30¢ a share had been declared and paid on common stock outstanding on August 31, 1956. No dividends were declared or paid on common stock during the fiscal year ended September 30, 1958.

After dividends in the amount of $1.20 in cash shall have been declared or paid or set apart for payment on each share of common stock outstanding on August 31, 1956, each share of Class B stock may be converted into ten shares of common stock. Until so converted Class B stock is not entitled to dividends. The Class B stock so converted shall not be reissued and shall be canceled. At September 30, 1958, 2,019,970 shares of unissued common stock are reserved for conversion.

Each share of common stock shall be entitled to one vote and each share of Class B stock to ten votes.

Under a Restricted Stock Option Plan for Key Employees, adopted in June, 1956 by National Vending Corporation and assumed by Continental Industries, Inc. upon the merger of those companies, options were granted to purchase 126,500 shares of the latter company's common stock at $2.50 a share, aggregating $316,250. The fair value at the date the options were granted was believed to be $2.50 a share. The options could be exercised as to one-half of the optioned shares during the six months' period commencing December 15, 1956 and one-quarter of the optioned shares during each subsequent twelve months' period. The options expire June 15, 1959. Up to September 30, 1958, 107,562 shares were issued upon exercise of options. At September 30, 1958, options were outstanding for 18,938 shares.

9. During the fiscal year ended September 30, 1958 the balance of consolidated paid-in surplus increased from $3,491,345 to $3,586,145 as the result of the issuance of 39,500 shares of common stock upon the exercise of options (see Note 8).

10. For federal income tax purposes, the companies report on an individual company basis. The provision for federal income taxes shown in the consolidated statement of income represents taxes related to those companies which had net taxable income for the fiscal year ended September 30, 1958 reduced by approximately $385,000 under the loss carry forward provisions of the Internal Revenue Code (see Note 3).

11. There are two actions pending against the Company for breach of contract and a counterclaim asserted in an action brought by the Company. It is the belief of management and of counsel that these suits and counterclaim are without merit as to substance and that there should be no recovery thereon.

[fol. 3044]

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REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS

To the Board of Directors,
Continental Industries, Inc.:

We have examined the consolidated balance sheet of CONTINENTAL INDUSTRIES, INC. and its Subsidiaries as of September 30, 1959, and the related statement of income and earned surplus for the fiscal year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances; however, it was not practicable to make physical tests of inventories of merchandise in vending machines, although we have satisfied ourselves as to such inventories by means of other auditing procedures.

In our opinion, the accompanying consolidated balance sheet and the related statement of income and earned surplus present fairly the consolidated financial position of Continental Industries, Inc. and its subsidiaries at September 30, 1959, and the consolidated results of their operations for the fiscal year then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

LYBRAND, ROSS BROS. & MONTGOMERY

Lybrand, Ross Bros. & Montgomery

New York, January 21, 1960.

[fol. 305]

EXHIBIT B TO EXHIBIT 1

[fol. 306]

EXHIBIT B - Page 2 of 4

CONSOLIDATED BALANCE SHEET, SEPTEMBER 30, 1959

Continental INDUSTRIES-INC. AND ITS SUBSIDIARIES

ASSETS:

Current assets:		
Cash		$ 482,225
Accounts and notes receivable, trade (Note 3)	$2,894,734	
Other accounts and notes receivable (Note 3):		
Valley Commercial Corp., affiliate	384,402	
Nationwide Vending Service, Inc., affiliate	68,572	
Others	897,632	
	4,245,340	
Less, Allowance for doubtful accounts	56,891	4,188,449
Inventories, at lower of cost or market (Note 2)		3,152,032
Prepaid expenses		1,615,683
Total current assets		9,438,389
Mortgage receivable (noninterest-bearing, due December 1, 1974)		200,000
Deferred accounts and notes receivable (Notes 3 and 5)		1,125,972
Property, plant and equipment (Notes 3 and 7):		
Vending machines	7,642,602	
Other, principally buildings, machinery and equipment	2,024,616	
	9,667,218	
Less, Reserve for depreciation	2,990,537	
	6,676,681	
Land	13,000	6,689,681
Nonoperating property	390,150	
Less, Reserve for depreciation	234,003	156,147
Deferred charges and other assets:		
Research and development	734,155	
Other	1,281,622	2,015,777
		$19,625,966

The accompanying notes are an integral part of the financial statements.

LIABILITIES:

Current liabilities:		
Notes and mortgages payable, other than to affiliate, instalments due within one year (Notes 3 and 4):		
Notes:		
Banks	$1,772,097	
Others	2,191,903	
Mortgages	7,672	$ 3,971,672
Loans payable to bank and others (Note 5)		1,586,531
Accounts payable		3,063,389
Valley Commercial Corp., affiliate, notes payable, instalments due within one year (Note 6)		442,607
Accrued expenses and taxes:		
Federal income tax	414,710	
Other	505,212	919,922
Total current liabilities		9,984,121
Notes payable, other than to affiliate, instalments due after one year (Notes 3 and 4):		
Banks	693,750	
Others	1,790,695	2,484,445
Valley Commercial Corp., affiliate, notes payable, instalments due after one year (Note 6)		357,416
Deferred federal income tax (Note 3)		225,000
Deferred income		89,717
Contingent liabilities (Notes 7 and 11)		

CAPITAL:

Capital stock (Note 8):		
Common, par value $.10 a share; 4,000,000 shares authorized, 1,535,074 shares issued	153,507	
Class B, par value $1.00 a share; 201,997 shares authorized and issued	201,997	
Paid-in surplus (Note 9)	3,631,596	
Earned surplus, as annexed	2,298,167	6,285,267
		$19,625,966

The accompanying notes are an integral part of the financial statements.

CONSOLIDATED STATEMENT OF INCOME AND EARNED SURPLUS

for the fiscal year ended September 30, 1959

Continental
INDUSTRIES·INC. AND ITS SUBSIDIARIES

Sales and operating income		$25,490,525
Cost of sales		17,730,620
		7,759,905
Selling and administrative expenses		5,929,934
		1,829,971
Depreciation and amortization		1,009,268
		820,703
Other income, including net profits of $804,139 from sales of vending machines and other capital assets (Note 3)	$830,720	
Other deductions, principally interest	736,990	93,730
Income before provision for federal income taxes		914,433
Provision for federal income taxes (Notes 3 and 10)		140,000
Net income		774,433
Earned surplus, September 30, 1958		1,523,734
Earned surplus, September 30, 1959		$ 2,298,167

The accompanying notes are an integral part of the financial statements.

[fol. 307]

EXHIBIT B - Page 3 of 4

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

1. The consolidated financial statements of Continental Industries, Inc. include the accounts of all of its subsidiaries (all wholly-owned) at September 30, 1959 and for the year then ended.

2. Inventories include merchandise for sale through vending machines, manufacturing finished stock, raw materials and work in process, and supplies. The inventories are recorded generally at cost, on an average or first-in, first-out basis, which amounts were not in excess of replacement market at September 30, 1959. Warehouse receipts covering finished vending machines aggregating approximately $150,000 have been pledged as collateral for loans.

3. Property, plant and equipment are recorded generally at cost, reduced by the proceeds of occasional sales of used vending machines. Cost, as applied to vending machines, includes the purchase price of such machines acquired as a group in operating locations together with an amount, $322,632, representing the excess of the aggregate cost of investments in certain subsidiaries over the related net assets of such subsidiaries at dates of acquisition. Such amount is recorded as cost of vending machines since trade practice in arriving at the purchase price for groups of such machines in operating locations is, in most instances, the same whether the machines are purchased directly or the capital stock of a company operating the machines is purchased. Vending machines include equipment (sold under conditional sales contracts, see Note 7) which in effect is pledged as collateral security for certain notes payable and equipment subject to chattel mortgages as collateral for unpaid purchase prices. Other properties, including non-operating properties, are subject to mortgages payable. The aggregate recorded amount of property subject to such liens is approximately $3,860,000 and the aggregate of unpaid notes and mortgages is $3,192,713.

During the fiscal year ended September 30, 1959, various groups of vending machines owned by subsidiary companies in operating locations were sold. The unpaid portion of the sales prices deemed to be collectible within one year ($599,118) is included in other accounts and notes receivable, and the portion of such sales prices collectible after one year ($448,820) is included in deferred accounts and notes receivable. A profit of $829,334, exclusive of the related provisions for income taxes, is included in other income.

Notes receivable from customers and from purchasers of groups of vending machines are pledged as collateral for notes and loans payable. The aggregate amount of pledged notes is $1,543,756, of which $740,095 is included in notes receivable, trade; $53,625 in other notes receivable; and $750,036 in deferred accounts and notes receivable.

The Company and its subsidiaries depreciate the cost of vending machines for corporate accounting purposes over an estimated service life which exceeds that used for income tax purposes. The Company deducts certain expenditures in the year of disbursement for federal income tax purposes and amortizes such expenditures over a longer period for corporate accounting purposes. An amount equivalent to the resulting tax reduction in the fiscal year ended September 30, 1959, reduced by the deferred federal income tax provided in the prior fiscal year relating to vending machines sold in the current fiscal year, has been charged to income.

4. Notes and mortgages payable, other than to affiliate:

	Instalments Due Within One Year	Instalments Due After One Year
Bank notes, with collateral:		
Payable in quarterly instalments of $346,875 from October 1, 1959 to April 1, 1961, interest payable quarterly at 6½ per cent a year	$1,734,375	$ 693,750
Payable on demand, interest payable monthly at 6 per cent a year (see Note 3)	37,722	
	$1,772,097	$ 693,750
Other notes:		
Demand:		
With collateral (see Note 3)	$ 100,000	
Without collateral	4,000	
Other notes, payable in varying monthly amounts from $393,702 in October, 1959 to $124,037 in September, 1960, and from $122,652 in October, 1960, to $139 in June, 1969; interest paid in advance at 6 per cent a year on approximately $3,421,000, current interest payable at various rates on approximately $263,000 and approximately $194,000 in noninterest-bearing:		
With collateral (see Notes 3 and 7)	1,652,467	$1,532,575
Without collateral	435,436	258,120
	$2,191,903	$1,790,695
Mortgages payable in varying monthly amounts including interest	$ 7,672	

After December 31, 1959, and on the last day of each calendar quarter thereafter until September, 1960, the holders of the bank notes aggregating $2,428,125 may at their option give the Company written notice that the unpaid principal amount, together with accrued interest, shall be payable on the last day of the next succeeding quarter. Investments in, and advances to, consolidated subsidiaries by Continental Industries, Inc. have been eliminated from the consolidated balance sheet; however, notes receivable by Continental Industries, Inc. from subsidiaries, aggregating $1,530,000, and the capital shares of certain subsidiaries have been pledged as collateral for these notes payable.

5. In accordance with an agreement relating to the bank loan, such loan is presently being reduced by application of collections on customers' notes pledged as collateral, interest is payable monthly at six per cent a year. A portion of such customers' notes ($533,738) matures after September 30, 1960. However, the unpaid balance of the loan may become payable at any time in or within six months after demand by the bank. In addition to customers' notes, notes received by Continental Industries, Inc. from subsidiaries (aggregating approximately $177,000) and eliminated from the consolidated balance sheet, have been pledged as collateral. Other loans, for which warehouse receipts and notes receivable serve as collateral (see Notes 2 and 3), are payable on demand, interest is payable monthly at varying rates.

6. Valley Commercial Corp., affiliate:

	Instalments Due Within One Year	Instalments Due After One Year
Notes, without collateral, payable in varying monthly amounts from $37,303 in October, 1959 to $36,185 in September, 1960 and from $36,185 in October, 1960 to $694 in October, 1962; interest discounted in advance at 6 per cent	$442,607	$557,416

7. The Company follows the practice of discounting customers' notes, including those of subsidiary companies, arising from the sale of vending machines under conditional sales contracts. Under the terms of such contracts, title to the machines remains in the seller as security for the notes until the notes are fully paid. The conditional sales contracts are assigned by the Company to certain financial organizations as collateral for the discounted notes. In addition to discounting customers' notes, the Company and its subsidiaries have discounted a portion of the notes arising from sales of groups of vending machines in operating locations (see Note 3), and have sold or assigned unsecured accounts. At September 30, 1959 the Company and its subsidiaries were contingently liable in the approximate amount of $3,000,000 in connection with notes discounted and accounts sold or assigned.

An annual rental of $107,125 is payable for a period of twenty-five years from November 1, 1957, on property leased by the Company at Westbury, New York. Under renewal options such annual rental is reduced to $53,562. The Company has a contingent liability of approximately $511,800 as guarantor of a first mortgage on such property. Annual rentals aggregating $34,675 are payable for eleven years on other leases; after such period the rentals are reduced.

8. In the event of liquidation of the Company, voluntary or involuntary, the common stock shall be entitled to a "liquidation preference" equal to $1.20 a share less the amount of any dividends declared or paid with respect to shares of common stock outstanding on August 31, 1956. After such "liquidation preference" the common stock and Class B stock shall share in liquidation on the basis of 1¢ for each share of common stock for every 10¢ for each share of Class B stock. Prior to September 30, 1957 cash dividends aggregating 30¢ a share had been declared and paid on common stock outstanding on August 31, 1956. No further dividends were declared or paid on common stock.

After dividends in the amount of $1.20 in cash shall have been declared or paid or set apart for payment on each share of common stock outstanding on August 31, 1956, each share of Class B stock may be converted into ten shares of common stock. Until so converted Class B stock is not entitled to dividends. The Class B stock so converted shall not be reissued and shall be canceled. At September 30, 1959, 2,019,970 shares of unissued common stock are reserved for conversion.

Each share of common stock shall be entitled to one vote and each share of Class B stock to ten votes.

Under a Restricted Stock Option Plan for Key Employees, adopted in June, 1956 by National Vending Corporation and assumed by Continental Industries, Inc. upon the merger of those companies, options were granted to purchase 126,500 shares of the latter company's common stock at $2.50 a share, aggregating $316,250. The options expired June 15, 1959. Up to September 30, 1959, 126,500 shares were issued upon exercise of options. No further shares may be issued under this plan.

9. During the fiscal year ended September 30, 1959, the balance of consolidated paid-in surplus increased from $3,586,145 to $3,631,596 as the result of the issuance of 18,938 shares of common stock upon the exercise of options (see Note 8).

10. For federal income tax purposes, the companies report on an individual company basis. The provision for federal income taxes shown in the consolidated statement of income represents taxes related to those companies which had net taxable income for the fiscal year ended September 30, 1959 reduced by approximately $494,000 under the loss carry-forward provisions of the Internal Revenue Code. The provision for federal income taxes has been reduced by claims for refund of approximately $108,800 under the loss carry-back provisions of the Internal Revenue Code and by approximately $113,000 representing provisions for prior years' taxes no longer required and has been increased by the net change in deferred federal income tax (see Note 3).

11. There are two actions pending against the Company, one for a breach of contract and the other a counterclaim asserted in an action brought by the Company. It is the belief of management and of counsel that this suit and counterclaim are without merit or substance and that there should be no recovery thereon.

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EXHIBIT C TO EXHIBIT 1

CONSOLIDATED BALANCE SHEET, SEPTEMBER 30, 1960

Continental
INDUSTRIES·INC. AND ITS SUBSIDIARIES

ASSETS:

Current assets:		
Cash		$ 897,592
Accounts and notes receivable, trade, less allowance for doubtful accounts (Note 1)		1,480,520
Other accounts and notes receivable:		
Valley Commercial Corp., affiliate	$ 397,996	
Principally from sales of vending machines in operating locations and other capital assets	3,964,978	
Others	237,696	4,600,670
Inventories, at lower of cost or market (Note 2)		3,370,876
Advance commissions		251,871
Prepaid expenses		626,154
Total current assets		11,227,693
Mortgage receivable (noninterest-bearing, due December 1, 1974)		200,000
Deferred accounts and notes receivable		238,467
Property, plant and equipment (Note 3):		
Vending machines	3,236,353	
Other, principally buildings, machinery and equipment	2,248,704	
	5,485,057	
Less, Reserve for depreciation	1,550,656	
	3,934,401	
Land	33,225	3,967,626
Nonoperating property	390,150	
Less, Reserve for depreciation	245,720	144,430
Deferred charges and other assets:		
Research and development	1,252,499	
Advance commissions	189,943	
Other	591,890	2,034,332
		$17,812,538

LIABILITIES:

Current liabilities:		
Notes, loans and mortgages payable, instalments due within one year (Note 4):		
Notes:		
Banks	$1,518,250	
Valley Commercial Corp., affiliate	548,195	
Others	2,826,858	
Loans	614,257	
Mortgages	5,888	$ 5,513,448
Accounts payable		2,682,615
Accrued expenses and taxes:		
Federal income tax	462,346	
Other	644,811	1,107,157
Total current liabilities		9,303,220
Notes and mortgages payable, instalments due after one year (Note 4):		
Notes:		
Valley Commercial Corp., affiliate	401,657	
Others	909,289	
Mortgages	105,070	1,416,016
Deferred federal income tax		290,000
Deferred income		70,461
Contingent liabilities (Note 5)		

CAPITAL:

Capital stock (Notes 6 and 7):		
Common, par value $.10 a share; 4,000,000 shares authorized, 1,535,074 shares issued and outstanding	153,507	
Class B, par value $1.00 a share; 201,997 shares authorized, issued and outstanding	201,997	
Paid-in surplus (no change during year)	3,631,596	
Earned surplus, as annexed	2,745,741	6,732,841
		$17,812,938

The accompanying notes are an integral part of the financial statements.

CONSOLIDATED STATEMENT OF INCOME AND EARNED SURPLUS

for the year ended September 30, 1960

Continental INDUSTRIES, INC. AND ITS SUBSIDIARIES

Sales and operating income		$26,861,735
Cost of sales		20,828,323
		6,033,412
Selling and administrative expenses		5,915,557
		117,855
Depreciation and amortization		948,949
		831,094*
Other income, including net profits of $2,347,262 from sales of vending machines in operating locations and other capital assets	$2,377,723	
Other deduction, interest	899,055	1,478,668
Income before provision for federal income taxes		647,574
Provision for federal income taxes		200,000
Net income		447,574
Earned surplus, September 30, 1959		2,298,167
Earned surplus, September 30, 1960		$ 2,745,741

*Indicates red figure.

The accompanying notes are an integral part of the financial statements.

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

1. Accounts and notes receivable from customers aggregating $622,171 are pledged as collateral for notes and loans payable.

2. Inventories include merchandise for sale through vending machines, manufactured finished stock, raw materials, work in process and supplies. The inventories are recorded generally at cost, on an average or first-in, first-out basis, which amounts were not in excess of replacement market at September 30, 1960. Warehouse receipts covering vending machines included in finished stock aggregating approximately $125,000 have been pledged as collateral for loans.

3. Property, plant and equipment are recorded generally at cost, reduced by the proceeds of occasional sales of used vending machines. Cost, as applied to vending machines, includes the purchase price of such machines acquired as a group in operating locations. Vending machines include equipment which in effect is pledged as collateral security for certain notes payable and equipment subject to chattel mortgages as collateral for unpaid purchase prices. Other properties are subject to mortgages payable. The aggregate recorded amount of property subject to such liens is approximately $1,900,000 and the aggregate of unpaid notes and mortgages is $1,349,354.

4. Notes, loans and mortgages payable:

	Instalments Due Within One Year	Instalments Due After One Year
Bank notes, with collateral:		
6% notes payable in equal quarterly instalments on October 1, 1960 and January 1, 1961 and $693,750 payable on April 1, 1961	$1,387,500	
6% notes payable on demand	130,750	
	$1,518,250	
Notes, without collateral, payable to Valley Commercial Corp. (an affiliate, of which Company Messrs. Harold Roth and Robert S. Hirsch are officers, directors and stockholders) in declining monthly amounts from $48,773 in October, 1960 to $1,245 in October, 1963; interest discounted in advance at 6%	$ 548,195	$401,657
Other notes payable in declining monthly amounts from $692,084 in October, 1960 to $139 in June, 1969; interest paid in advance at 5% and 6% a year on approximately $2,602,000, current interest payable at various rates on approximately $989,000 and approximately $145,000 is non-interest-bearing:		
With collateral	$ 603,018	$635,378
Without collateral	2,223,840	273,911
	$2,826,858	$909,289
Demand loans payable to bank and others, interest payable at various rates:		
With collateral	$ 515,009	
Without collateral	99,248	
	$ 614,257	
5½% and 6% mortgages payable in varying monthly amounts through April, 1975	$ 5,888	$105,070

These notes were paid in full as of January 1, 1961 and all collateral relating thereto was released to the Company. On January 6, 1961, the Company obtained a bank loan of $1,000,000, due April 5, 1961 with interest prepaid at 6%.

5. The Company follows the practice of discounting customers' notes, including those of subsidiary companies, arising from the sale of vending machines under conditional sales contracts. Under the terms of such contracts, title to the machines remains in the seller as security for the notes until the notes are fully paid. The conditional sales contracts are assigned by the Company to certain financial organizations as collateral for the discounted notes. In addition to discounting customers' notes, the Company and its subsidiaries have discounted or guaranteed notes arising from sales of groups of vending machines in operating locations. At September 30, 1960, the Company and its subsidiaries were contingently liable in the approximate amount of $4,500,000 in connection with notes discounted or guaranteed.

An annual rental of $107,125 is payable for a period of twenty-five years from November 1, 1957, on property leased by the Company at Westbury, New York. Under renewal options such annual rental is reduced to $53,562. The Company has a contingent liability of approximately $491,000 as guarantor of a first mortgage on such property. Annual rentals aggregating approximately $67,000 are payable on other leases expiring after September 30, 1963.

There are two actions pending against the Company, one for a breach of contract and the other a counterclaim asserted in an action brought by the Company. It is the belief of management and of counsel that this suit and counterclaim are without merit or substance and that there should be no recovery thereon.

6. In the event of liquidation of the Company, voluntary or involuntary, the common stock shall be entitled to a "liquidation preference" equal to $1.20 a share less the amount of any dividends declared or paid with respect to shares of common stock outstanding on August 31, 1956. After such liquidation preference" the common stock and Class B stock shall share in liquidation on the basis of 1¢ for each share of common stock for every 10¢ for each share of Class B stock. Prior to September 30, 1957, cash dividends aggregating 30¢ a share had been declared and paid on common stock outstanding on August 31, 1956. No further dividends have been declared or paid on common stock.

After dividends in the amount of $1.20 in cash shall have been declared or paid or setaapart for payment on each share of common stock outstanding on August 31, 1956, each share of Class B stock may be converted into ten shares of common stock. Until so converted Class B stock is not entitled to dividends. The Class B stock so converted shall not be reissued and shall be canceled. At September 30, 1960, 2,019,970 shares of unissued common stock are reserved for conversion.

Each share of common stock is entitled to one vote and each share of Class B stock to ten votes.

See Note 7.

7. Subsequent to September 30, 1960 the Board of Directors approved the following proposals to be submitted to the stockholders at the Annual Meeting on February 28, 1961:

1. Increase the authorized common stock of the Company from 4,000,000 to 6,000,000 shares, par value $.10 a share.

2. Amend the conversion privilege of the Class B stock to permit conversion of such stock into common stock when a total of cash dividends in the sum of $.30, instead of the $1.20 as now provided, has been declared paid or set apart for payment upon each share of common stock. To compensate for this reduction, the Board of Directors has voted to declare a 15% stock dividend to the common stockholders, the record date to be determined subsequent to the Annual Meeting, contingent upon approval of the amendment by the stockholders. The Class B stockholders who convert their shares of Class B stock into common stock will not be entitled to participate in this dividend.

Under an agreement dated November 1, 1960 the Company agreed to acquire the outstanding capital stock of Pyramid Vending Co., Inc. in exchange for 147,079 shares of the Company's common stock. The shares will be issued as soon as an application for listing of these shares has been filed with and approved by the American Stock Exchange. Some of Pyramid's vending machines in operating locations were acquired in 1958, 1959 and 1960 from the Company and the Company realized gross profits of approximately $1,000,000 on such transactions. Subsequent to the November 1, 1960 agreement certain of these vending machines in operating locations were resold for approximately $350,000, which was in excess of their cost.

Under an agreement dated December 30, 1960 the Company acquired all of the properties and assets of subsidiaries of United States Hoffman Machinery Corporation called the "Apco Group" and assumed substantially all liabilities of such subsidiaries. The purchase price was $3,500,000 of which $500,000 was payable in cash and $3,000,000 in 6% notes, payable $50,000 a month from January 30, 1961 and $1,200,000 on January 30, 1964. Prepayment of part or all of the $1,200,000 note is required if major financing is obtained by the Company. In January, 1961, a stockholder of United States Hoffman Machinery Corporation instituted a derivative action to cancel and rescind this agreement. The Company is named in the action as a party defendant. It is the belief of counsel that there is no merit to this action.

On December 31, 1960, Crescent Cigarette Service, Inc., a wholly owned subsidiary, sold its cigarette vending machine route business to David Roth, a former director, for approximately $986,000.

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REPORT OF INDERENDENT CERTIFIED PUBLIC ACCOUNTANTS

To the Board of Directors,
Continental Industries, Inc.:

We have examined the consolidated balance sheet of CONTINENTAL INDUSTRIES, INC. and its Subsidiaries as of September 30, 1960, and the related statement of income and earned surplus for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying consolidated balance sheet and the related statement of income and earned surplus present fairly the consolidated financial position of Continental Industries, Inc. and its subsidiaries at September 30, 1960, and the consolidated results of their operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

LYBRAND, ROSS BROS. & MONTGOMERY

Lybrand, Ross Bros. & Montgomery

New York, February 7, 1961.

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EXHIBIT D TO EXHIBIT 1

CONTINENTAL VENDING MACHINE CORP.

Consolidated Balance Sheet, *September 30, 1961*

ASSETS

Current assets:		
Cash		$ 1,449,407
Accounts and notes receivable:		
Trade (Note 2)	$ 7,839,952	
Valley Commercial Corp., affiliate	848,006	
Others, including $671,460 from sales of vending machines in operating locations and other capital assets	1,054,887	
	9,742,845	
Less, Allowance for doubtful accounts	125,000	9,617,845
Inventories, at lower of cost (average or first-in, first-out) or market		3,778,102
Advance commissions		181,127
Prepaid expenses		674,247
Total current assets		15,700,728
Mortgage receivable (noninterest-bearing, due December 1, 1974)		200,000
Investment, at cost		500,000
Noncurrent accounts and notes receivable, including $802,166 from sales of vending machines in operating locations and other capital assets		1,390,016
Property, plant and equipment (Note 3):		
Vending machines	3,382,289	
Other, principally buildings, machinery and equipment	2,845,708	
	6,227,997	
Less, Reserve for depreciation	1,487,529	
	4,740,468	
Land	64,425	4,804,893
Property held for sale, less reserve of $257,443		132,707
Excess of cost of companies or operating properties acquired over related net assets, less amortization		1,876,507
Patents, at cost less amortization		1,570,551
Deferred charges and other assets:		
Research and development	1,537,618	
Advance commissions	142,492	
Other	1,284,362	2,964,472
		$29,139,874

The accompanying notes are an integral part of the financial statements.

LIABILITIES

Current liabilities:		
Notes and loans payable (Note 4)		$ 4,986,179
Long-term debt, portion due within one year (Note 5):		
Valley Commercial Corp., affiliate	$ 453,733	
Other	3,073,830	3,527,563
Accounts payable		2,883,445
Accrued expenses and taxes:		
Federal income tax	788,940	
Other	779,761	1,568,701
Total current liabilities		12,965,888
Long-term debt (Note 5):		
Valley Commercial Corp., affiliate	326,739	
Other	3,205,243	3,531,982
Liabilities paid from proceeds of debenture issue (Note 6)		3,250,000
Deferred federal income tax		118,000
Deferred income		147,515
Contingent liabilities (Note 7)		

CAPITAL

Common stock, par value $.10 a share; 4,750,000 shares authorized, 4,042,239 shares issued and outstanding, 38,462 shares to be issued (Note 8)	408,070	
Capital surplus, as annexed	7,281,363	
Retained earnings, as annexed (Note 6)	1,457,058	9,126,491
		$29,139,874

CONTINENTAL VENDING MACHINE CORP.

Consolidated Statement of Income and Retained Earnings *For the Year Ended September 30, 1961*

Sales and operating income		$29,217,025
Cost of sales		21,201,354
		8,015,671
Selling and administrative expenses		6,298,671
		1,717,000
Depreciation and amortization		749,352
		967,648
Other income, including net profits of $2,027,802 from sales of vending machines in operating locations and other capital assets	$ 2,120,264	
Other deductions, principally interest	1,128,765	991,499
Income before provision for federal income tax		1,959,147
Provision for federal income tax (Note 9)		710,000
Net income		1,249,147
Retained earnings, September 30, 1960	2,745,741	
Deficit, Pyramid Vending Co. Inc., September 30 1960	411,958	
	2,333,783	
Less, Adjustments in connection with pooling of interests (Note 1)	359,297	
Retained earnings, September 30, 1960, as adjusted (Note 1)		1,974,486
		3,223,633
Deduct, Amount based on market quotation for 252,698 shares of common stock issued as a 15% stock dividend		1,786,575
Retained earnings, September 30, 1961 (Note 6)		$ 1,437,058

Consolidated Statement of Capital Surplus *For the Year Ended September 30, 1961*

Balance, September 30, 1960	$ 3,631,596
Excess of capital stock account of Pyramid Vending Co. Inc. over par value of 147,079 shares of the Company's common stock issued in connection with pooling of interests (Note 1)	202,432
Balance, September 30, 1960, as adjusted	3,834,028
Excess of market over par value of shares of common stock issued or to be issued:	
252,698 shares issued as a 15% stock dividend, less expenses of issue, etc.	1,719,227
87,418 shares issued in exchange for capital stock of two companies and capital stock and debentures of another company	1,231,954
38,462 shares to be issued in exchange for net assets of another company (Note 8)	496,154
Balance, September 30, 1961	$ 7,281,363

The accompanying notes are an integral part of the financial statements.

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Notes to Consolidated Financial Statements

1. On March 3, 1961, the name of the Company was changed from Continental Industries, Inc. to Continental Vending Machine Corp.

In November, 1960 the Company acquired all of the outstanding capital stock of Pyramid Vending Co. Inc. in exchange for 147,079 shares of common stock of the Company. For accounting purposes this transaction has been recorded as a "pooling of interests." Under this accounting concept, the operations of the constituent companies are presumed to have been consolidated since the inception of the companies. Consolidated net income for the year ended September 30, 1960, adjusted to give effect to the pooling of interests, was $158,406.

2. Accounts and notes receivable in the approximate amount of $4,880,000 are pledged as collateral for notes and loans payable.

3. Property, plant and equipment, with minor exceptions, is recorded at cost. Vending machines include equipment which in effect is pledged as collateral security for certain notes payable and equipment subject to chattel mortgages as collateral for unpaid purchase prices. Other properties are subject to mortgages payable. The aggregate recorded amount of property subject to such liens is approximately $2,800,000 and the aggregate of unpaid notes and mortgages is approximately $2,200,000.

4. Approximately $4,200,000 of the notes and loans payable is secured by collateral.

5. Long-term debt includes approximately $1,866,000, $1,317,000, $124,000 and $124,000 payable in the fiscal years ending September 30, 1963 through 1966, respectively, and $101,000 payable thereafter.

Interest is payable at 6% per year discounted in advance on loans from Valley Commercial Corp. (an affiliate, of which company Mr. Harold Roth is an officer, director and stockholder). Interest on other long-term debt, including the portion due within one year, is payable currently at 6% a year on $2,595,000, at approximately 12% a year on $997,000 and at various other rates on $589,000; interest is discounted or paid in advance, principally at 6% a year, on $1,949,000; approximately $150,000 is noninterest-bearing. Approximately $4,033,000 of these amounts was secured by collateral.

6. In December, 1961 the Company sold $5,052,700 of 6% Convertible Subordinated Debentures due September 1, 1976. The debentures are (a) convertible into the Company's common stock from June, 1962 through August, 1976 at $8⅓ per share, subject to adjustment under certain conditions, (b) subordinated to all "senior indebtedness" of the Company, as defined in the indenture, and (c) redeemable at any time at the option of the Company as a whole or in part at prices ranging from 106% of principal amount in 1962 to par in 1975.

The indenture provides, among other things, that the Company will make payments to a purchase or sinking fund on December 1 of each of the years 1962 through 1975 in the annual amount of $333,000 reduced by the amount of debentures converted into common stock and by the amount of debentures redeemed or purchased by the Company. The indenture places certain restrictions upon declaration of dividends (other than stock dividends) and upon the purchase or redemption by the Company of its capital stock. None of the September 30, 1961 balance of retained earnings is available for dividends or stock acquisitions.

A portion of the proceeds of the sale of the convertible debentures was used to pay notes payable in the amount of $3,250,000. These notes are therefore shown in the consolidated balance sheet as noncurrent liabilities.

7. At September 30, 1961, the Company and its subsidiaries were contingently liable in the approximate amount of $13,000,000 in connection with notes discounted or guaranteed.

In accordance with the terms of the agreement dated December 30, 1960, whereby the Company acquired all of the properties and assets of certain subsidiaries of United States Hoffman Machinery Corporation called the "Apco Group" and assumed substantially all liabilities of such subsidiaries, twenty per cent of the capital shares of a subsidiary is pledged as collateral for certain obligations owing by United States Hoffman Machinery Corporation amounting to $300,000 at September 30, 1961. The remaining eighty per cent of the stock of this subsidiary is pledged as collateral for notes payable by the Company to United States Hoffman Machinery Corporation under the terms of the December 30, 1960 agreement. The aggregate balance of such notes at September 30, 1961 was $2,600,000 of which $800,000 was paid in December, 1961 from the proceeds of the sale of convertible debentures. (See Note 6).

In January, 1961 stockholders of United States Hoffman Machinery Corporation instituted a derivative action to cancel and rescind the sale of the "Apco Group" to the Company. The Company is named in the action

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as a party defendant. It is the belief of counsel that there is no merit to this action.

An annual rental of $107,125 is payable for a period of twenty-five years from November 1, 1957 on property leased by the Company at Westbury, New York. Under renewal options such annual rental is reduced to $53,562. The Company has a contingent liability of approximately $469,000 at September 30, 1961 as guarantor of a first mortgage on such property. Annual rentals of approximately $81,000 are payable on other leases expiring after three years from September 30, 1961.

There is an appeal pending against the Company for a breach of contract, and an action pending arising out of a counterclaim asserted in an action brought by the Company. It is the belief of management and of counsel that the appeal and counterclaim are without merit or substance and that there should be no recovery thereon.

In December, 1961 the Company and two of its officers and directors were indicted on three counts alleging violation of the Taft-Hartley Act. In the opinion of counsel, the charges are without merit.

The Company has agreed to repurchase certain vending equipment, sold to a leasing corporation by subsidiaries, in the event the operators of the equipment default under their rental agreements with such corporation. At September 30, 1961, the exposure of the Company amounted to approximately $2,000,000.

8. At the annual stockholders' meeting February 28, 1961, the stockholders approved an increase in the authorized shares of common stock, a 15% common stock dividend and an amendment to the Company's Certificate of Incorporation to give the holders of Class B stock an immediate right to convert their shares into common stock. Pursuant to stockholders' approval the authorized common stock of the Company was increased to 4,750,000 shares, a 15% common stock dividend was paid on April 17, 1961 to holders of record of the common stock on March 30, 1961, and the 201,997 issued and outstanding shares of Class B stock were converted into 2,019,970 shares of common stock.

Issuance of 38,462 shares of the Company's common stock in connection with the acquisition in July, 1961 of the net assets of another company was delayed pending compliance with the listing requirements of the American Stock Exchange. It is expected that such shares will be issued in February, 1962.

As a result of the sale by the Company in December, 1961 of its 6% Convertible Subordinated Debentures (see Note 6), 606,324 authorized and unissued shares of the Company's common stock are reserved for conversion.

9. For the fiscal year ended September 30, 1961, the Company and its subsidiaries intend to file federal income tax returns on a separate company basis. The provision for federal income tax shown in the consolidated statement of income has been reduced by approximately $420,000 by the application of the loss carry-overs and carry-back provisions of the Internal Revenue Code.

ACCOUNTANTS' OPINION

To the Board of Directors
Continental Vending Machine Corp.:

We have examined the consolidated balance sheet of CONTINENTAL VENDING MACHINE CORP. and its subsidiaries as of September 30, 1961 and the related consolidated statements of income and retained earnings and of capital surplus for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying consolidated financial statements present fairly the consolidated financial position of Continental Vending Machine Corp. and its subsidiaries at September 30, 1961 and the consolidated results of their operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Lybrand, Ross Bros. & Montgomery

LYBRAND, ROSS BROS. & MONTGOMERY

New York, February 1, 1962.

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[fol. 317]

EXHIBIT E TO EXHIBIT 1

CONTINENTAL VENDING MACHINE CORP.

Consolidated Balance Sheet, *September 30, 1962*

ASSETS

Current assets:		
Cash		$ 285,966
Accounts and notes receivable:		
Trade (Note 1)	$ 6,194,590	
Others, including $319,900 applicable to federal income tax	659,452	
	6,854,042	
Less, Allowance for doubtful accounts	150,000	
	6,704,042	
Valley Commercial Corp., affiliate (Note 2)	2,143,335	8,847,377
Inventories, at lower of cost (average or first-in, first-out) or market (Note 1)		5,265,015
Amounts receivable from purchasers of assets sold subsequent to September 30, 1962 (Note 3)		4,669,432
Prepaid expenses		1,034,714
Total current assets		20,102,504
Mortgage receivable (non-interest-bearing, due December 1, 1974)		200,000
Noncurrent accounts and notes receivable:		
Valley Commercial Corp., affiliate (Note 2)	1,400,000	
Others	649,405	2,049,405
Property, plant and equipment (Note 4):		
Vending machines	2,877,692	
Other, principally machinery and equipment	2,943,792	
	5,821,484	
Less, Accumulated depreciation	1,347,964	
	4,473,520	
Land	60,156	4,533,676
Assets held for sale, at estimated net realizable value (Note 3)		1,582,999
Excess of cost of companies or operating properties acquired over related net assets (Note 5)		1,223,824
Patents, at cost less amortization		1,480,199
Deferred charges and other assets		1,179,793
		$32,352,400

See notes to consolidated financial statement

LIABILITIES

Current liabilities:		
Notes and loans payable (Note 6)		$ 7,789,285
Long-term debt, portion due within one year		8,203,788
Accounts payable		2,353,898
Accrued expenses and taxes		696,291
Total current liabilities		19,043,262
Long-term debt (Note 7):		
6% convertible subordinated debentures (Note 8)	$ 4,719,700	
Valley Commercial Corp., affiliate (Note 2)	486,130	
Other	2,665,309	7,871,139
Deferred federal income tax		106,000
Deferred income		102,230
Contingent liabilities (Note 9)		

CAPITAL

Common stock, par value $.10 a share; 4,750,000 shares authorized, 4,080,701 shares issued and outstanding (Note 10)	408,070	
Capital surplus (Note 11)	4,821,699	
Retained earnings since September 30, 1962, as annexed (Notes 10 and 11)	—	5,229,769
		$32,352,400

CONTINENTAL VENDING MACHINE CORP.

Consolidated Statement of Income (Loss) and Retained Earnings *For the Year Ended September 30, 1962*

Sales and operating income		$22,916,905
Cost of sales		15,253,532
		7,663,373
Selling and administrative expenses		6,773,124
		890,249
Depreciation and amortization		784,197
		106,052
Other income, principally interest		292,935
		398,987
Interest expense		1,645,018
Income (loss) before provision (credit) for federal income tax		(1,246,031)
Provision (credit) for federal income tax (Note 12)		(379,000)
Net income (loss)		(867,031)
Retained earnings, September 30, 1961		1,437,058
		570,027
Deduct:		
Write-off as of October 1, 1961 (Note 5):		
Deferred research and development expenses	$ 1,537,618	
Deferred expenses related to development of in-plant feeding program	439,786	
Write-down to estimated net realizable value as of September 30, 1962:		
Assets sold subsequent to September 30, 1962 and assets held for sale (Note 3)	774,702	
Excess of cost of companies or operating properties acquired over related net assets	709,585	
	3,461,691	
Less, Federal income tax adjustments	432,000	3,029,691
		(2,459,664)
Elimination of deficit by charge to capital surplus (Note 11)		2,459,664
Retained earnings, September 30, 1962 (Notes 10 and 11)		—

See notes to consolidated financial statements.

[fol. 318]

Notes to Consolidated Financial Statements

1. Accounts and notes receivable approximating $4,590,000 and inventories approximating $1,000,000 are pledged as collateral for notes and loans payable.

2. The amount receivable from Valley Commercial Corp. (an affiliated company of which Mr. Harold Roth is an officer, director and stockholder) bears interest at 12% a year. Such amount, less the balance of the notes payable to that company, is secured by the assignment to the Company of Valley's equity in certain marketable securities. As of February 15, 1963, the amount of such equity at current market quotations exceeded the net amount receivable.

3. During July, 1962 the Company acquired the businesses of two companies operating vending machine routes. Subsequent to September 30, 1962, the Company has sold certain of the routes and is negotiating for the sale of the remaining routes. Because the Company's control of the businesses is temporary, their operations (which showed sales of $1,396,859 and income of $53,043 since dates of acquisition) have been excluded from the consolidated statement of income (loss) for the year ended September 30, 1962. The Company's investment in these routes has been written down to estimated net realizable value at September 30, 1962, by a charge to retained earnings.

4. Property, plant and equipment, with minor exceptions, is recorded at cost. Substantially all vending machines are pledged as collateral security for certain notes payable. Other properties are subject to mortgages payable. The aggregate recorded amount of property subject to such liens is approximately $3,440,000 and the aggregate of unpaid notes and mortgages is approximately $1,800,000.

5. Prior to October 1, 1961, the Company followed the practice of (a) amortizing research and development expenses over a two-year period from the beginning of production of new types of vending machines, (b) deferring certain expenses incurred in connection with the development of its in-plant feeding program, to be amortized over a five-year period, and (c) amortizing the excess of cost of companies or operating properties acquired over related net assets over a twenty-year period. Effective October 1, 1961, the Company adopted the policy of (a) charging research and development expenses to income as incurred, (b) charging in-plant feeding program development expenses to income as incurred, and (c) reflecting no amortization of the excess of cost of companies or operating properties acquired over related net assets unless there is an indication of loss of value. As a result of these changes, the net loss for the year was increased by approximately $198.000.

6. Approximately $5,953,000 of the notes and loans payable is secured by collateral.

7. The amounts of long-term debt payable during each of the years ending September 30, 1964 through 1967 are as follows:

Year Ending	
1964	$2,201,055
1965	1,141,039
1966	693,081
1967	373,777
Thereafter	3,462,187
	$7,871,139

The amounts of long-term debt, including the portion due within one year, on which interest is payable currently or has been discounted in advance, are as follows:

Payable currently:	
At 6% a year	$ 9,292,012
At various other rates, principally 12% a year	1,586,049
Discounted in advance, principally at 6% a year:	
Valley Commercial Corp., affiliate	1,029,475
Others	4,003,034
Noninterest-bearing	164,357
	$16,074,927

Approximately $9,144,000 of these amounts was secured by collateral.

8. The 6% convertible subordinated debentures, due September 1, 1976, are (a) convertible into the Company's common stock (see Note 10), (b) subordinated to all "senior indebtedness" of the Company, as defined in the indenture, and (c) redeemable at any time at the option of the Company as a whole or in part at prices ranging from 105.57% of principal amount through August 31, 1963 to par in the twelve-month period ending August 31, 1976. However, the agreement covering certain loans, which mature through April, 1965, prohibits the prepayment or redemption of the debentures except to the extent of the mandatory annual instalments. The bond indenture provides, among other things, that the Company make payments to a purchase or sinking fund on December 1 of each year through 1975 in annual amounts of $333,000 reduced by the amount of debentures converted into common stock and by the amount of debentures redeemed or purchased by the Company.

9. At September 30, 1962, the Company and its subsidiaries were contingently liable in the approximate amount of $11,000,000 in connection with notes discounted or guaranteed.

The Company has agreed to repurchase certain vending equipment, sold to a leasing corporation by subsidiaries, in the event the operators of the equipment default under their rental agreements with such corporation. At September 30, 1962, the exposure of the Company amounted to approximately $700,000.

[fol. 319]

The capital shares of certain subsidiaries are pledged as collateral for notes of the Company payable to banks. The capital shares of another subsidiary are pledged as collateral for a note payable by that subsidiary. The aggregate balance of such notes was $2,914,833 at September 30, 1962.

Annual rentals of approximately $284,000 are payable on leases expiring after September 30, 1965. The Company is contingently liable in the approximate amount of $446,000 at September 30, 1962 as guarantor of a first mortgage on certain leased property.

In accordance with the terms of the agreement dated December 30, 1960, whereby the Company acquired all of the properties and assets of certain subsidiaries of United States Hoffman Machinery Corporation called the "Apco Group" and assumed substantially all liabilities of such companies, twenty per cent of the capital shares of a subsidiary is pledged as collateral for a note payable by the Company, which had a balance of $80,049 at September 30, 1962, and an obligation of United States Hoffman Machinery Corporation, which had a balance of $150,000 at September 30, 1962. The remaining eighty per cent of the stock of this subsidiary is pledged as collateral for notes payable by the Company to United States Hoffman Machinery Corporation aggregating $959,951 at September 30, 1962.

Stockholders of United States Hoffman Machinery Corporation have instituted a derivative action to cancel and rescind the sale of the "Apco Group" to the Company. The Company is named in the action as a party defendant. It is the belief of counsel that there is no merit to this action.

There is an appeal pending against the Company for a breach of contract, and an action pending arising out of a counterclaim asserted in an action brought by the Company. It is the belief of management and of counsel that the appeal and counterclaim are without merit or substance and that there should be no recovery thereon.

In December, 1961 the Company and two of its officers and directors were indicted on three counts alleging violation of the Taft-Hartley Act. In the opinion of counsel, the charges are without merit.

10. The 6% convertible subordinated debentures are convertible into the Company's common stock at any time through August, 1976 at $8⅓ per share; subject to adjustment under certain conditions. At September 30, 1962, 585,444 shares were reserved for such conversion.

The indenture relating to the debentures places certain restrictions upon declaration of dividends (other than stock dividends) and upon the purchase or redemption by the Company of its capital stock. Under the terms of the agreement covering certain loans which mature through April, 1965, the Company is prohibited from declaring dividends (other than stock dividends) and from purchasing, redeeming or issuing additional shares of its capital stock.

11. The Board of Directors at its meeting on February 13, 1963 directed that the deficit of $2,459,664 as of September 30, 1962 be eliminated by a charge to capital surplus, subject to the approval of the stockholders at the next annual meeting. This charge represents the only change in capital surplus during the year.

12. The credit for federal income tax shown in the consolidated statement of income (loss) has been increased by approximately $156,000 by the application of the loss carry-back provisions of the Internal Revenue Code.

ACCOUNTANTS' OPINION

To the Board of Directors
Continental Vending Machine Corp.:

We have examined the consolidated balance sheet of CONTINENTAL VENDING MACHINE CORP. and its subsidiaries as of September 30, 1962 and the related consolidated statement of income (loss) and retained earnings for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying consolidated financial statements present fairly the consolidated financial position of Continental Vending Machine Corp. and its subsidiaries at September 30, 1962 and the consolidated results of their operations for the year then ended, in conformity with generally accepted accounting principles, which, except for the changes described in Note 5 relating to research and development expenses, development expenses in connection with the in-plant feeding program, and amortization of excess of cost of companies or operating properties acquired over related net assets, with which changes we concur, have been applied on a basis consistent with that of the preceding year.

Lybrand, Ross Bros. & Montgomery

LYBRAND, ROSS BROS. & MONTGOMERY

New York, February 15, 1963.

[fol. 320]

[fol. 321] EXHIBIT 2 TO AFFIDAVIT

Complaint filed by Irving L. Wharton as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. v. Harold Roth, et al. in the USDC for the Eastern District of New York on September 25, 1964 (omitted in printing).

[fol. 364] EXHIBIT A TO EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 63 Civil 897

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CONTINENTAL VENDING MACHINE CORP., VALLEY COMMERCIAL CORPORATION, HAROLD ROTH, ROBERT S. HIRSCH, MATTHEW FORBES, ARTHUR N. FIELD, CLAIRE GANS, SIDNEY A. FLOREA, HARRY MERESMAN, HERBERT S. STERNBERG,

Defendants.

COMPLAINT

Plaintiff Securities and Exchange Commission ("Commission") for its complaint herein alleges:

1. As more fully appears hereinafter, defendants have been and are now engaged and are about to engage in acts and practices which constitute, have constituted and will constitute violations of Sections 13, 15(d) and 20(c) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78m, 78o(d) and 78t(c), and the rules and regulations promulgated thereunder. The Commission, pursuant to Section 21(e) and (f) of the Act, 15 U.S.C. 78u(e), brings this action to enjoin such acts and practices, to compel the filing of periodic reports required by the Act and for the appointment of a receiver of the assets of defendants Continental

Vending Machine Corp. and Valley Commercial Corporation.

2. This court has jurisdiction of this action under Section 27 of the Act, 15 U.S.C. 78aa.

3. Continental Vending Machine Corp. ("Continental") is incorporated under the laws of the State of Indiana. At all times mentioned herein, Continental has transacted business in the Southern District of New York, in many States of the United States and in foreign countries. It has maintained an office at 1270 Avenue of the Americas, New York, N. Y., and its principal office at the present time is in Westbury, New York. During such period it owned or operated properties or plants in New Jersey, Florida, Pennsylvania, Indiana and New York. The principal activities of Continental consist of the design, development, manufacture and sale of vending machines, the installation and maintenance of industrial automatic cafeterias, and the sale of consumer products through the operation and maintenance of vending machine routes.

4. As of September 30, 1962 Continental had outstanding two classes of publicly owned securities, namely, $4,719,700 principal amount Six Percent Convertible Subordinated Debentures due September 1, 1967, and 4,080,701 shares of common stock. It has over 5000 security holders. Both of these securities during the times mentioned herein [fol. 365] were registered and, until February 27, 1963, were traded on the American Stock Exchange, a national securities exchange as defined in the Act.

5. Valley Commercial Corporation ("Valley") is incorporated under the laws of the State of New York and shares offices with Continental at Westbury, New York. Valley has one class of securities, namely, common stock, all of which is owned by defendants Harold Roth, Robert S. Hirsch, Matthew Forbes and Arthur N. Field or their nominees. Valley is completely dominated and controlled by these four defendants and by defendants Claire Gans and Herbert S. Sternberg. As appears from its books and

records, Valley is in the business of advancing money. The sources of the funds it advances are banks, factors and defendant Continental. During the period mentioned herein, the principal source of its funds has been Continental. While some of its advances during this period may have been made to operators of vending machines, a very substantial portion of these advances have been made to defendants, defendants' relatives and companies unrelated to Continental controlled by one or more defendants. As more fully hereinafter set forth, one of Valley's principal activities during Continental's fiscal year 1962 was to act as a conduit of funds flowing from Continental to one or more of defendants.

6. Harold Roth was until his nominal resignation on March 5, 1963, president, chairman of the board and a director of Continental. As of November 30, 1962, as shown by his last Form 4 report filed with the Commission, he owned 980,508 shares of Continental and $1,068,600 principal amount of its convertible debentures. Thus, Roth owns a controlling interest of 24% of Continental's stock, with the potential of increasing this interest materially by converting his debentures into stock. He is by far the largest stockholder of Continental. Roth resides at 140 Everit Avenue, Hewlet Bay Park, New York.

Although Roth "resigned" his above positions as of March 5, he continues to receive from Continental the same salary ($57,200 per annum) as he received when he held these positions. He continues to dominate Continental as its "general manager."

7. Robert S. Hirsch owns beneficially upwards of 200,000 shares of Continental and with Roth also dominates and controls Continental. Until early in 1961 he was a director, secretary, treasurer and chairman of the board of Continental. He is president of Valley. He resides at 242 Hewlett Neck Road, Woodmere, Long Island, New York.

8. Matthew Forbes owns beneficially upwards of 574,138 shares of Continental and with Roth and Hirsch dominates and controls Continental. He resides at Tolly Park Road, Rye, New York.

9. Arthur N. Field, together with Harold Roth, Robert S. Hirsch and Matthew Forbes, owns, dominates and controls Valley. Field is a member of the law firm of Field, Florea & Field, 39 Broadway, New York, N. Y., which firm acts as general counsel to both Continental and Valley. Field was a director of Continental until 1960, when his place was taken by his partner, defendant Sidney A. Florea.

[fol. 366] 10. Claire Gans is an employee of Valley, handles financial transactions, signs checks and keeps the books. She is compensated in excess of $20,000 per year. She was a party to and participated in the transactions hereinafter referred to. She resides at 224-24 Union Turnpike, Bayside, New York.

11. Sidney A. Florea since 1960 has been a director of Continental. He is a member of the law firm of Field, Florea & Field, 39 Broadway, New York, N. Y.

12. Harry Meresman since 1960 has been a director of Continental. He is a member of the accounting firm of Abrams, Meresman & Co., accountants for Valley, 545 Madison Avenue, New York, N. Y. Prior to 1960 his partner Frank Abrams was a director of Continental.

13. Herbert S. Sternberg is a director and secretary of Continental and at one time was treasurer of Continental. He is a vice-president of Valley. He resides at 107 Belmont Circle, Syosset, New York.

14. On August 11, 1961 Continental filed with the Commission a registration statement with respect to $5,052,700 principal amount of Six Percent Convertible Subordinated Debentures pursuant to the Securities Act of 1933, 15 U.S.C. 77a et seq. This registration statement, as amended, became effective December 6, 1961. As required by Section 15(d) of the Act, this registration statement (which was signed by defendants Roth, Florea, Meresman and Sternberg, among others), contained an undertaking that Continental would file with the Commission, on or before 120

days after the end of each fiscal year, an annual report on Form 10-K (17 C.F.R. 249.310), including a certified balance sheet as of the close of its fiscal year and a certified profit and loss statement for its fiscal year and certain other schedules.

15. Continental's debentures and the common stock are registered on the American Stock Exchange, a national securities exchange. The common stock of Continental has been registered with this Exchange since July 2, 1947. Section 13 of the Act requires Continental, as the issuer of a security registered on a national securities exchange, to file with the American Stock Exchange, New York, N. Y., and with the Commission, the Form 10-K described above, at the times described above.

16. Continental's 1962 fiscal year closed September 30, 1962. Under Sections 13 and 15(d) of the Act it was required to file an annual report Form 10-K for its 1962 fiscal year no later than January 28, 1963. It applied for and was granted a 30-day extension until February 28, 1963, upon its representation that it had made substantial acquisitions of routes during the last quarter of the fiscal year, and that there was not sufficient time to enable its auditors to review these transactions. Continental thereafter applied for a further extension, which was denied on March 6, 1963, because on March 5, 1963 Lybrand, Ross Bros. & Montgomery, Continental's auditors, advised the Commission that they could not unqualifiedly certify its financial statements because of doubt as to the collectibility of Con- [fol. 367] tinental's advances to Valley described below. On March 15, 1963, the Commission received what purported to be Continental's annual report on Form 10-K for the year ended September 30, 1962, which contained no financial statements whatsoever, certified or uncertified.

17. On information and belief, the required Form 10-K containing certified financial statements has not been filed because the individual defendants participated in or rati-

fied or acquiesced in the practices and transactions described below and have obstructed, hindered and prevented Continental's auditors from preparing and completing an adequate audit of the financial condition of Continental. On information and belief, no proper filing will be made or can be made by Continental so long as the individual defendants are permitted to continue in control of Continental and Valley.

18. The Commission began a formal investigation of the matter on March 6, 1963. Prior to this date defendants had refused Continental's auditors, Lybrand, Ross Bros. & Montgomery, access to the books and records of Valley to determine the value of Continental's receivables from Valley. After the investigation began, Valley made its books available to the Commission and to Continental's auditors. These books show, among other things, the following advances during Continental's fiscal year 1962 by Continental to Valley, and by Valley, in turn, to the individual defendants and others:

		Advances by Valley to		
	Advances by Continental to Valley	*Harold Roth*	*Companies Owned by Harold Roth*	*Relatives of Roth and Their Companies*	*Claire Gans*
Outstanding 10/1/61	$ 848,006	$ 436,073	$636,347	$ 914,851	$ 38,300
Advances in fiscal 1962	5,476,550	4,689,120	77,500	1,380,958	218,950
TOTAL	$6,324,556	$5,125,193	$713,847	$2,295,809	$257,250
Repayments during fiscal 1962	3,107,830	1,981,941	366,792	1,172,869	221,300
Outstanding 9/30/62	$3,216,726	$3,143,252	$347,055	$1,122,940	$ 35,950

19. These advances by Continental to Valley, and in turn by Valley to defendants, continued after the close of the fiscal year. In its incomplete report filed with the Commission on March 15, 1963, Continental stated that on January 31, 1963 "loans" made by Continental to Valley on open account aggregated over $4,000,000 including accrued interest, that Harold Roth, then president of Continental, was indebted to Valley in an amount equal to or

exceeding the amount due to Continental from Valley; that Valley was unable to repay any part of its debt to Continental due to defendant Roth's inability to repay any part of his debt to Valley.

20. In about February of 1963 the American Stock Exchange because of the activity in Continental stock made inquiries of Continental as to its financial condition. As a result of these inquiries, the American Stock Exchange suspended trading in Continental securities on February 27, 1963. The Commission suspended all trading in Continental securities for ten days starting March 8, 1963. This suspension was renewed as of March 18, 1963 and March 28, 1963.

[fol. 368] 21. The individuals thoroughly familiar with the advances from Continental to Valley and from Valley to defendants, are defendants Roth and Gans. All stockholders of Valley other than Roth have disclaimed to the Commission knowledge of Valley's operations, including defendant Hirsch, its president. On March 7, 1963, pursuant to its statutory powers of investigation, the Commission attempted to examine Roth under oath as to the affairs of Continental and Valley. Roth declined to answer any questions, invoking the Fifth Amendment. Similarly, on March 18, 1963 the Commission attempted to examine Gans. She likewise refused to answer any questions, invoking the Fifth Amendment.

22. All of Continental's directors except three have resigned. Only defendants Sternberg, Meresman and Florea are now on the board. All of Continental's principal officers except one have nominally resigned. Only Sternberg, as secretary, remains. Thus, nominal management of Continental rests in the hands of Valley's accountant (Meresman), the counsel for both Valley and Continental (Florea), and an officer of both Valley and Continental (Sternberg), who in fiscal 1962 was the recipient of $81,400 in net advances from Valley in connection with a venture he entered into with Roth's father, Max Roth, and Roth's

brother, David G. Roth. Behind this rump management stands the domination and control of Roth, the $57,200 a year "general manager" without portfolio.

23. Continental's annual meeting of stockholders, originally set for February 28, 1963, has been twice adjourned and is now scheduled for April 25, 1963. Since Roth took control, Continental has never found it necessary to solicit proxies (except in one instance to meet statutory requirements). It has shown no sign of soliciting proxies for the forthcoming stockholders' meeting.

24. Two of the officers and directors who recently resigned from Continental were permitted to buy substantial vending routes from Continental at the time of their departure. Melvin Chasen, formerly a director and vice-president, resigned on December 31, 1962. On January 17, 1963 he purchased two vending routes from Continental for $1,987,400, of which $437,400 was paid in cash and the remainder by various notes, the collectibility of which is undetermined. Lester Schuster resigned as a director and treasurer on February 18, 1963, as of February 12, 1963. On February 15, 1963, Continental contracted to sell Schuster several vending routes for the approximate sum of $1,429,000. During fiscal year 1962 Chasen held net advances from Valley totalling $42,107, and Schuster held net advances from Valley totalling $39,571. Chasen repaid his advances by the end of the fiscal year. Schuster did not. In both instances the advances were without security.

25. Unless this Court enjoins defendants from further hindering, delaying and obstructing the filing by Continental of an annual report Form 10-K for its fiscal year 1962, and unless this Court affirmatively directs Continental and its officers and directors and controlling persons [fol. 369] promptly to file such report, defendants will continue to prevent the filing of such a report and none will be filed. In past years Continental, controlled by Roth, has habitually asked for extensions of time to file its Form 10-K. In the case of the Form 10-K for fiscal 1962, Con-

tinental three times assured the Commission that the report would be filed by an ever-later day certain, but none has been filed to date.

26. Under the stewardship of the individual defendants, less than a year and a half after raising more than $5 million from the public, defendants are unable to account to the Commission, the American Stock Exchange or the investing public as to Continental's true financial picture and the disposition by Continental of the funds it received. As officers and directors, under the aegis of Roth, they have stood idly by and watched millions of dollars of securities holders' money flow through Valley to Roth and family for reasons for which they are unable to account. They have permitted hundreds of thousands of dollars of the amounts received by Valley to be advanced in many cases without interest or security, to themselves. The books and records of Continental and Valley are so incomplete and inadequate that no proper Form 10-K can be filed until an independent audit has been made under the supervision of a receiver acting under the direction of this Court. Defendants have in their possession, custody and control money and property of Continental and Valley which they may transfer, sell, assign, pledge or otherwise waste or dissipate to the immediate and irreparable loss and damage of Continental's public security holders, unless the Court appoints a receiver of the assets of Continental and Valley.

WHEREFORE plaintiff demands

I. A mandatory injunction commanding defendants to file with the American Stock Exchange and the Securities and Exchange Commission within such time as the court deems proper a complete and accurate annual report of Continental on Form 10-K for the year ended September 30, 1962 containing a certified balance sheet and a certified profit and loss statement as required by the instructions to Form 10-K and by Rule 2.02 of Regulation S-X;

II. A preliminary injunction and final judgment enjoining defendants, their officers, servants, agents, employees

and those persons in active concert or participation with them, from failing to and refusing to file with the American Stock Exchange and the Securities and Exchange Commission proper and timely reports of Continental as required by Sections 13 and 15(d) of the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder, and from hindering, delaying and obstructing the making and filing of the same;

III. An order appointing a receiver to take possession of all the assets, property, books and records of Continental and of Valley, and authorizing empowering and directing such receiver to collect and take charge of the same and to hold the same subject to the further order of this Court, [fol. 370] and to cause to be made and filed a report on Form 10-K for Continental's fiscal year 1962 and

IV. Such other further and different relief as to this Court may seem just.

PETER A. DAMMANN
General Counsel

LLEWELLYN P. YOUNG
Regional Administrator

ALAN J. WHITE
Attorney

Attorneys for Plaintiff
Securities and Exchange Commission
225 Broadway
New York 7, N. Y.

Telephone: REctor 2-6363

[fol. 371]

EXHIBIT 3 TO AFFIDAVIT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 65-C-664

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco Inc.,

Plaintiff,

—against—

LYBRAND, ROSS BROS. & MONTGOMERY, MEADOW BROOK NATIONAL BANK and HAROLD ROTH,

Defendants.

No. 64-C-946

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco Inc.,

Plaintiff,

—against—

HAROLD ROTH, et al.,

Defendants.

October 24, 1966

This is a motion for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure made on behalf of Robert H. Kaiser (Kaiser), a partner in the accounting firm of the defendant, Lybrand, Ross Bros. & Montgomery (Lybrand). The action was instituted July 1, 1965, and [fol. 372] consolidated with an action commenced September 25, 1964, against Harold Roth, the principal officer of both Continental Vending Machine Corp. and Continental Apco Inc. (which said corporations are in reorganization pursuant to Chapter X of the Bankruptcy Act), and others.

On October 17, 1966, a six-count indictment was filed in the United States District Court for the Southern District of New York, against Kaiser and other individuals, naming Lybrand and others as co-conspirators. The indictment contains five mail fraud counts (18 U.S.C. § 1341) and a conspiracy count (18 U.S.C. § 371). Though the time periods of the indictment do not coincide with those of the claims, it is clear that the transactions on which the civil claims are stated, in the main, form the basis of the criminal charges.

Kaiser's argument for a protective order is that compulsory *appearance* for examination is oppressive, and constitutes a violation of his Fifth Amendment right against self-incrimination. At oral argument, counsel for Kaiser declined to say whether Kaiser would assert his constitutional privilege.

The precise issue involved here has not been determined [fol. 373] in any case cited by the parties; nor has the Court's research produced a case that answers the question in the form put. In the cases cited by Kaiser,[1] the privilege was asserted; the courts' decisions sustained the assertion of the right. These decisions do not support Kaiser's position here. Ample authority describes the nature of the privilege against self-incrimination and the procedures to be employed for its assertion.

The right against self-incrimination is personal. It is only effective, if asserted. In *Emspak* v. *United States*, 1955, 349 U.S. 190, 196, 75 S.Ct. 687, 691, the Court quoted *Smith* v. *United States*, 1949, 337 U.S. 137, 150, 69 S.Ct. 1000, 1007, as follows:

> "... Although the privilege against self-incrimination *must be claimed*, when claimed it is guaranteed by the Constitution." [Emphasis added.]

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[1] *National Discount Corp.* v. *Holzbaugh*, 1952, 13 F.R.D. 236 (E.D.Mich.); *Paul Harrigan & Sons* v. *Enterprise Animal*, Oct. 1953, 14 F.R.D. 333 (E.D.Pa.) and *Perry* v. *McGuire*, 1964, 36 F.R.D. 272.

Cases discussed below hold that the privilege must be asserted at the time of examination and directed to a specific question. Those cases may differ from the cases cited by Kaiser, though it is to be noted that *Perry* v. *McGuire*, [fol. 374] *supra*, and *Paul Harrigan & Sons* v. *Enterprise Animal Oil Co.*, *supra*, dealt with specific questions put in interrogatories under Rule 33 in addition to examinations under Rule 26. Further, in *National Discount Corp.* v. *Holzbaugh*, *supra*, the defendant had been deposed part of the day, when he was advised that an indictment had been returned; here again, the specific line of inquiry was brought to the attention of the Court. Judge Weinfeld, in *Cravatts* v. *Klozo Fastener Corp.*, 1953, 15 F.R.D. 12, and *United States* v. *Lustig*, 1954, 16 F.R.D. 138, held that assertion of the privilege in an affidavit supporting a motion to vacate a notice of examination, is inappropriate; the time to assert the privilege is at the time of examination, and it must be put to a specific question. Judge Lumbard (C.J.) in *Shaughnessy* v. *Bacolas*, 1955, 135 F. Supp. 15, 17, in denying a motion to vacate an order enforcing an administrative proceeding instituted by the Bureau of Immigration and Naturalization, said:

> "... It is of course premature at this stage of the proceedings for him to assert the privilege with respect to testimony he may be asked to give. Only after individual questions have been propounded can it be determined whether it may be reasonably claimed that the answers will incriminate him."

[fol. 375] The judicial determination of the propriety in asserting the constitutional privilege against self-incrimination cannot be made until it is put in issue by the party to whom it belongs. *Village of Brookfield* v. *Pentis*, 1939, 7th Cir., 101 F.2d 516, 523. It has not yet been put in issue here.

The Trustee states that large sums of money have been expended in the preparation for trial of this law suit; that the delay in disposing of this law suit may substan-

tially delay the adoption of a plan of reorganization in the related proceedings, *In the Matter of Continental Vending Machine Corp.* (63-B-663), and *In the Matter of Continental Apco Inc.* (63-B-959).

The claim of oppression is based on the Fifth Amendment privilege, but Kaiser need only claim his right. This requirement does not appear to be oppressive.

The motion is in all respects denied.

A related question was mentioned with respect to a witness named McDevitt. The Court makes no ruling with reference to him solely because his failure to testify is not properly before the Court.

[fol. 376] Robert H. Kaiser is directed to appear and submit to examination at the Clerk's Office in the United States Courthouse, 225 Washington Street, Brooklyn, New York, on Wednesday, October 26th, at 2:00 P.M. He may assert his privilege against self-incrimination at that time.

The Court dispenses with the requirement of a formal order and the directions herein contained are,

So ordered.

Jacob Mishler, U. S. D. J.

[fol. 377]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
66 Crim. 831

UNITED STATES OF AMERICA, Plaintiff,

—against—

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

AFFIDAVIT OF THOMAS W. HILL, JR., DATED NOVEMBER 1, 1966 IN SUPPORT OF MOTION FOR INJUNCTION

State of New York,
County of New York, ss.:

Thomas W. Hill, Jr., being duly sworn deposes and says:

1. I am an attorney and a partner in the firm of Spear and Hill. I have appeared for the individual defendants in this case in which Messrs. Sullivan & Cromwell have also been retained as counsel. I appeared with the defendant Kaiser in my capacity as counsel in the criminal case at his deposition in *Wharton* v. *Lybrand, Ross Bros. et al.*, 65 Civ. 664 (E.D.N.Y.) and *Wharton* v. *Roth et al.*, 64 Civ. 946 (E.D.N.Y.).

2. From my familiarity with the issues in the civil action, I can affirm the fact that the charges presented in the indictment in this prosecution against the three individual members of Lybrand, Ross Bros. ("Lybrand") are substantially identical to the charges made against Lybrand in the civil case. Judge Mishler recognized this similarity in his opinion denying defendant Kaiser's motion for a [fol. 378] protective order, in which he stated that "it is

clear that the transactions on which the civil claims are stated, in the main, form the basis of the criminal charges." (Exhibit 3 to Schwartz affidavit.)

3. I am informed by counsel for Lybrand that the deposition testimony of defendant Simon has alone produced approximately 1800 pages. Kaiser has begun testifying on his deposition and from the detailed nature of examination conducted to date it is obvious that Kaiser's deposition will be at least as extensive as Simon's. This would also be true of Fishman.

4. I have also been informed on a number of occasions by the Assistant United States Attorney in charge of the prosecution of this case that in preparing this case for presentation to the grand jury he relied extensively on the discovery produced in the civil actions, that he has read the deposition testimony given therein, and that he has been in personal contact with the attorneys for the plaintiff in those cases. I have actually seen a number of the depositions and certain of the documents produced during the course of such depositions in the office of the same Assistant United States Attorney.

5. I have reviewed the deposition testimony of defendant Robert Kaiser and I am convinced that the questions asked therein are substantially similar to the questions which would be propounded by the prosecution in this case upon cross-examination.

Thomas W. Hill, Jr.

Subscribed and sworn to before me this 1st day of November, 1966.

Florence V. Foppiano, Notary Public, State of New York, No. 24-1270000 Qual. in Kings Co., Commission Expires March 30, 1967.

(Seal)

[fol. 379]

ATTACHMENT TO ORDER TO SHOW CAUSE

66 Crim. 831

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

CARL SIMON, HAROLD ROTH, ROBERT KAISER, MELVIN FISHMAN, Defendants.

INDICTMENT

[Stamp—U. S. District Court—Filed Oct 17 1966—S. D. of N. Y.]

Robert M. Morgenthau, United States Attorney.

A True Bill

Arthur M. Atkins, Foreman.

[fol. 380]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Crim. 831

UNITED STATES OF AMERICA,

—v.—

CARL SIMON, HAROLD ROTH, ROBERT KAISER, MELVIN FISHMAN, Defendants.

INDICTMENT—Filed October 17, 1966

Count One

The Grand Jury charges:

1. From on or about the 30th day of September 1961, up to and including the 27th day of February, 1963, in the Southern District of New York and elsewhere, Carl Simon, Harold Roth, Robert Kaiser and Melvin Fishman, the defendants herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with Lybrand, Ross Bros. & Montgomery (hereinafter "Lybrand"), Richard McDevitt, Arthur Field, Lester Schuster, and Irving Kalan, named herein as co-conspirators but not as defendants, and with other persons to the Grand Jury known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 1001 and 1341 and Title 15, United States Code, Section 78ff.

[fol. 381] 2. It was part of the said conspiracy that the defendants and their co-conspirators would, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Securities and Exchange Commission, make false, fictitious and fraudulent statements

and would, by trick, scheme, and device conceal material facts.

3. It was further part of the said conspiracy that defendants and their co-conspirators would unlawfully, wilfully and knowingly, make and cause to be made statements contained in a report and document required to be filed with the Securities and Exchange Commission under Chapter 2B of Title 15, United States Code and the rules and regulations prescribed thereunder, which statements were false and misleading.

4. It was further part of said conspiracy that defendants and their co-conspirators would enter into a scheme and artifice to defraud, and for purposes of executing such scheme and artifice would cause to be placed in post offices and authorized depositories for mail matter certain matters and things to be sent and delivered by the Post Office Department, and would cause such matters and things to be delivered by mail according to the directions thereon.

[fol. 382] 5. It was further a part of said conspiracy that co-conspirator Lybrand, Ross Bros. & Montgomery (hereinafter "Lybrand") a firm of independent certified public accountants, would report on and certify to the financial condition of Continental for the fiscal year ending September 30, 1962.

6. It was further a part of said conspiracy that on February 15, 1963, co-conspirator Lybrand, representing itself as an "independent" certified public accountant would certify to financial statements contained in an "Annual Report 1962-Continental Vending Machine Corp." (hereinafter referred to as the "annual report to stockholders"), which financial statements contained a balance sheet which was false and misleading.

7. It was further a part of said conspiracy that in or about February, 1963, Lybrand would certify to Continental's financial statements for fiscal 1962 contained in a Form 10K Annual Report, required by law to be filed with the

Securities and Exchange Commission and the American Stock Exchange and which financial statements would contain a balance sheet which was false and misleading.

8. It was further a part of said conspiracy that defendants and their co-conspirators, in the balance sheets referred to in paragraphs 6 and 7 above, would make ma- [fol. 383] terially false, fictitious, fraudulent, deceptive and misleading statements and representations and would conceal and omit material facts, including, but not limited to the following:

A. Defendants and their co-conspirators would fraudulently conceal the following material facts and circumstances, which, if known to the readers of the said balance sheets, would have informed them that defendant Harold Roth was using his positions as President and Chairman of the Board of Continental for his own private benefit to the detriment of Continental:

(1) Defendant Harold Roth had caused Continental to transfer substantial sums of money to Valley Commercial Corp. (hereinafter "Valley");

(2) Defendant Harold Roth was using Valley as a conduit to transfer substantial sums of money to himself; and

(3) Defendant Harold Roth had used the sums of money received from Valley for his own personal benefit and was unable to repay Valley which, in turn, was unable to repay Continental.

B. Defendants and their co-conspirators would lead the readers of the said balance sheets erroneously to conclude that the amount receivable due from Valley shown on the balance sheets was more than adequately secured, by in- [fol. 384] cluding the following footnote on the balance sheets:

"The amount receivable from Valley Commercial Corp. (an affiliated company of which Mr. Harold Roth is an officer, director and stockholder) bears interest at 12%

a year. Such amount, less the balance of the notes payable to that company, is secured by the assignment to the Company of Valley's equity in certain marketable securities. As of February 15, 1963, the amount of such equity at current market quotations exceeded the net amount receivable.",

when in truth and in fact, as defendants and their co-conspirators then and there well knew, such footnote was false and misleading and concealed material facts, in the following respects:

(1) The notes payable to Valley could not be netted or offset against the amount receivable due from Valley;

(2) Approximately 80% of the so-called "marketable securities" were not in fact "marketable" as they consisted of common stock and convertible debentures of Continental, owned by defendant Harold Roth and members of his family, which could not be sold to the public without the satisfaction of prior liens on the said Security and without a registration statement being filed with the Securities and Exchange Commission; and

(3) The footnote was misleading in that it concealed the material fact that 80% of the "securities" consisted of the common stock and convertible debentures of Continental itself, the value of which depended upon Continental's [fol. 385] solvency which in turn depended upon Valley's ability to pay the debt;

(4) The amount receivable from Valley had substantially increased between the end of the fiscal year, September 30, 1962 and the date of certification by co-conspirator Lybrand, February 15, 1963.

C. Defendants and their co-conspirators would lead the readers of the balance sheets erroneously to conclude that Continental had "$285,966" in "cash" completely and immediately available for the operations of its business and the payment of its debts, when in truth and in fact, as the

defendants and their co-conspirators then and there well knew:

(1) Continental had no such amount of "cash" of this nature and was in fact in a deficit cash position of over a million dollars; and

(2) A substantial portion of the $285,966 consisted of money withheld from employees for payment of income and Social Security taxes.

D. Defendants and their co-conspirators would fraudulently conceal the material fact that Continental was in default on term loan agreements with banking institutions totaling $1,750,000;

E. Defendants and their co-conspirators would fraudulently conceal the material fact that defendant Harold Roth was causing Continental to engage in the following fraudu-
[fol. 386] lent activities and practices in order to alleviate its critical cash position:

(1) Continental was operating a "check kite" and "check float" through banks throughout the country, the amount of which on September 30, 1962 was approximately $1,300,000 to $1,500,000;

(2) Continental was financing a substantial amount of fictitious accounts receivable with a commercial factor, James Talcott, Inc.;

(3) Continental was intentionally violating the terms of chattel mortgage agreements made with James Talcott, Inc.; and

(4) Continental was intentionally withholding funds in violation of a factoring agreement with a commercial bank.

[fol. 387] Overt Acts

The following overt acts, among others, were committed in the Southern District of New York:

1. On or about February 6, 1963, defendant Harold Roth met with defendant Carl Simon.

2. On or about February 12, 1963, defendant Robert Kaiser met with co-conspirator Arthur Field.

3. On or about February 11, 1963, defendants Carl Simon, Robert Kaiser, Melvin Fishman and Harold Roth attended a meeting.

4. On or about February 12, 1963, defendants Carl Simon, Robert Kaiser, Melvin Fishman and Harold Roth attended a meeting.

5. On or about February 26, 1963, defendant Carl Simon received a Form 10K Annual Report for Continental's 1962 fiscal year.

(Title 18, United States Code, Section 371.)

[fol. 388] Count Two

The Grand Jury further charges:

1. From on or about the 30th day of September, 1961, up to and including the 27th day of February, 1963, in the Southern District of New York and elsewhere, Carl Simon, Harold Roth, Robert Kaiser and Melvin Fishman, the defendants, and Lybrand, Ross Bros. & Montgomery, Richard McDevitt, Arthur Field, Lester Schuster and Irving Kalan, not named as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud Continental Vending Machine Corp.'s (hereinafter "Continental") stockholders and prospective stockholders, Continental's debenture holders and prospective debenture holders, Continental's creditors and prospective creditors, stock brokerage houses, banks, financial analysts, the American Stock Exchange and others to the Grand Jury unknown (hereinafter referred to as the "persons to be defrauded").

2. It was a part of said scheme and artifice to defraud that Lybrand Ross Bros. and Montgomery (hereinafter

"Lybrand"), holding itself out as a firm of "independent" certified public accountants, would report on and certify to the financial condition of Continental in the "Annual Report, 1962—Continental Vending Machine Corp." (hereinafter referred to as the annual report to stockholders), which report included a balance sheet which was false and misleading.

[fol. 389] 3. It was further a part of said scheme and artifice to defraud that defendants and others, in the balance sheet included in the annual report to stockholders, would make materially false, fictitious, fraudulent, deceptive and misleading statements and representations, and would conceal and omit material facts, including, but not limited to the following:

A. Defendants and others would fraudulently conceal the following material facts and circumstances, which, if known to the persons to be defrauded, would have informed them that defendant Harold Roth was using his positions as President and Chairman of the Board of Continental for his own private benefit to the detriment of Continental:

(1) Defendant Harold Roth had caused Continental to transfer substantial sums of money to Valley Commercial Corp. (hereinafter "Valley");

(2) Defendant Harold Roth was using Valley as a conduit to in turn transfer substantial sums of money to himself; and

(3) Defendant Harold Roth had used the sums of money received from Valley for his own personal benefit and was unable to repay Valley which, in turn, was unable to repay Continental.

[fol. 390] B. Defendants and others would lead the persons to be defrauded erroneously to conclude that the amount receivable due from Valley, as shown on the balance sheet, was more than adequately secured, by including the following footnote on the said balance sheet:

"The amount receivable from Valley Commercial Corp. (an affiliated company of which Mr. Harold Roth is an officer, director and stockholder) bears interest at 12% a year. Such amount, less the balance of the notes payable to that company, is secured by the assignment to the Company of Valley's equity in certain marketable securities. As of February 15, 1963, the amount of such equity at current market quotations exceeded the net amount receivable.",

when in truth and in fact, as they then and there well knew, such footnote was false and misleading and concealed material facts, in the following respects:

(1) The notes payable to Valley could not be netted or offset against the amount receivable due from Valley;

(2) Approximately 80% of the so-called "marketable securities" were not in fact "marketable" as they consisted of common stock and convertible debentures of Continental, owned by defendant Harold Roth and members of his family, which could not be sold to the public without the satisfaction of prior liens on the security and without a registration statement being filed with the Securities and Exchange Commission; and

[fol. 391] (3) The footnote was misleading in that it concealed the material fact that 80% of the "securities" consisted of the common stock and convertible debentures of Continental itself, the value of which depended upon Continental's solvency which in turn depended upon Valley's ability to pay the debt;

(4) The amount receivable from Valley had substantially increased between the end of the fiscal year, September 30, 1962 and the date of certification by co-conspirator Lybrand, February 15, 1963.

C. Defendants and others would falsely and fraudulently lead the persons to be defrauded erroneously to conclude that Continental had "$285,966" of "cash" completely

and immediately available for the operations of its business and the payment of its debts, when in truth and in fact, as they then and there well knew:

(1) Continental had no such amount of "cash" of this nature and was in fact in a deficit cash position of over a million dollars; and

(2) A substantial portion of the $285,966 consisted of money withheld from employees for payment of income and Social Security taxes.

D. Defendants and others fraudulently concealed the material facts that Continental was in default on term loan agreements with banking institutions totaling $1,750,000;

[fol. 392] E. Defendants and others would fraudulently conceal the material facts that defendant Harold Roth was causing Continental to engage in the following fraudulent activities and practices in order to alleviate its critical cash position:

(1) Continental was operating a "check kite" and "check float" through banks throughout the country, the amount of which on September 30, 1962 was approximately $1,300,000 to $1,500,000;

(2) Continental was financing a substantial amount of fictitious accounts receivable with a commercial factor, James Talcott, Inc.;

(3) Continental was intentionally violating the terms of chattel mortgage agreements made with James Talcott, Inc.; and

(4) Continental was intentionally withholding funds in violation of a factoring agreement with a commercial bank.

F. Defendants and others by way of a misleading and deceptive presentation on the above described balance sheet would lead the persons to be defrauded to believe erroneously that there was no current account payable due from Continental to Valley.

4. On or about the 21st day of February, 1963, in the Southern District of New York, defendants Carl Simon, Harold Roth, Robert Kaiser and Melvin Fishman, for the purpose of executing the scheme and artifice to defraud set forth in paragraphs 1 through 3 of this Count, unlawfully, wilfully and knowingly caused to be delivered by mail [fol. 393] according to the direction thereon a matter and thing, to wit, a package containing 59 copies of Continental's annual report to stockholders for fiscal 1962, addressed to:

Hirsch & Co.
25 Broad Street
New York 4, New York,

to be sent and delivered by the Post Office Department.

(Title 18, United States Code, Sections 1341 and 2)

Count Three

The Grand Jury further charges:

On or about the 26th day of February, 1963, in the Southern District of New York, defendants Carl Simon, Harold Roth, Robert Kaiser, and Melvin Fishman, for the purpose of executing the scheme and artifice to defraud set forth in paragraphs 1 through 3 of Count Two, which are incorporated herein by reference, unlawfully, wilfully and knowingly caused to be placed in a Post Office and authorized depository for mail matter a matter and thing, to wit, one copy of Continental's annual report to stockholders for fiscal 1962 addressed to:

Mr. Al Hanson
740 Riverside Drive
New York 31, New York

to be sent and delivered by the Post Office Department of the United States.

(Title 18, United States Code, Sections 1341 and 2)

[fol. 394]

Count Four

The Grand Jury further charges:

On or about the 21st day of February, 1963, in the Southern District of New York, defendants Carl Simon, Harold Roth, Robert Kaiser and Melvin Fishman, for the purpose of executing the scheme and artifice to defraud set forth in paragraphs 1 through 3 of Count Two, which are incorporated herein by reference, unlawfully, wilfully and knowingly caused to be delivered by mail according to the direction thereon a matter and thing, to wit, a package containing 25 copies of Continental's annual report to stockholders for fiscal 1962, addressed to:

Cohen, Simonson & Co.
25 Broad Street—Room 1414
New York City 4, New York
Attn: Mr. L. Hoffman

to be sent and delivered by the Post Office Department.

(Title 18, United States Code, Sections 1341 and 2)

Count Five

The Grand Jury further charges:

On or about the 21st day of February, 1963, in the Southern District of New York, defendants Carl Simon, Harold Roth, Robert Kaiser and Melvin Fishman, for the purpose of executing the scheme and artifice to defraud set forth in paragraphs 1 through 3 of Count Two, which are incorporated herein by reference, unlawfully, wilfully and know-

[fol. 395]

ingly caused to be delivered by mail according to the direction thereon a matter and thing, to wit, a package containing 170 copies of Continental's annual report to stockholders for fiscal 1962, addressed to:

Francis I. DuPont & Co.
Research Department
One Wall Street
New York, 5, New York,

to be sent and delivered by the Post Office Department.

(Title 18, United States Code, Sections 1341 and 2)

Count Six

The Grand Jury further charges:

On or about the 26th day of February, 1963, in the Southern District of New York, defendants Carl Simon, Harold Roth, Robert Kaiser and Melvin Fishman, for the purpose of executing the scheme and artifice to defraud set forth in paragraphs 1 through 3 of Count Two, which are incorporated herein by reference, unlawfully, wilfully and knowingly caused to delivered by mail according to the direction thereon a matter and thing, to wit, a copy of Continental's annual report to stockholders for fiscal 1962, addressed to:

Mark I. Finkelstein
214 W. 42nd Street
New York, New York,

to be sent and delivered by the Post Office Department.

(Title 18, United States Code, Sections 1341 and 2)

Robert M. Morgenthau, United States Attorney.

Arthur M. Atkins, Foreman.

October 17, 1966

[fol. 395a]

66 Crim. Action No. 831

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,

—against—

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

ORDER TO SHOW CAUSE, TEMPORARY RESTRAINING ORDER, SUPPORTING AFFIDAVITS

SULLIVAN & CROMWELL
48 Wall Street, New York 5, N. Y.
HAnover 2-8100

Attorneys for Moving Defendants

Received Copy 3:10 p.m. 11/1/66
HUGH C. HUMPHREYS

[Stamp—Copy Received—NOV 2-1966—Robert M. Morgenthau—So. Dist. of N. Y.]

Rcd. Copy 5:40 p.m. 11/1/66

Christy, Bauman, Frey & Christy

Atty. for Plf.

See Opinion.
Frederick vP. Bryan
U.S.D.J.
December 12, 1966

[fol. 396]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
66 Crim. 831

THE UNITED STATES OF AMERICA, Plaintiff,

—against—

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

AFFIDAVIT OF JOSEPH J. MARCHESO
DATED NOVEMBER 4, 1966 IN OPPOSITION

State of New York,
County of New York, *ss.*:

Joseph J. Marcheso, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice in this Court and in the Courts of this state. I am associated with the firm of Christy, Bauman, Frey & Christy, attorneys for Irving L. Wharton as Trustee in the Proceedings of the Reorganization of Continental Vending Machine Corp. and Continental Apco Inc. ("Continental"). I submit this application in opposition to defendants' motion for an order staying and enjoining Irving L. Wharton, his attorneys and agents from the further prosecution of any and all suits and claims against Lybrand, Ross Bros. & Montgomery ("Lybrand"), and staying and enjoining Irving L. Wharton, his attorneys and agents from taking the testimony before trial of defendants Simon, Kaiser or Fishman, or any other personnel or employee of Lybrand, [fol. 397] or from seeking to compel the production of files

[File endorsement omitted]

and requisite documents by defendants Simon, Kaiser or Fishman, or by Lybrand, or any other personnel or employee thereof, in any suit or proceeding, including, but not limited to, actions pending in the United States Court (sic) in and for the Eastern District of New York, entitled, 65 Civ. 664 *Irving L. Wharton, as Trustee, etc.* v. *Lybrand, Ross Bros. & Montgomery, et al.*, and 64 Civ. 946 *Irving L. Wharton, as Trustee, etc.* v. *Harold Roth, et al.*

Irving L. Wharton was appointed by the United States District Court in and for the Eastern District of New York (Mishler, J.) as trustee in the reorganization of Continental Vending Machine Corp. and Continental Apco Inc. The firm of Christy, Bauman, Frey & Christy represents Irving L. Wharton as trustee. On September 25, 1964, the trustee commenced a civil action (64 Civ. 946) in the United States District Court for the Eastern District of New York against various officers and directors of Continental and others. Lybrand was not named in that civil action. Either at that time or shortly thereafter, Lybrand was informed that the trustee through his counsel was investigating into the possibility of bringing a civil law suit against Lybrand, and shortly thereafter Lybrand was informed that it was the trustee's intention to bring an action against Lybrand. Several months of negotiations were entered into between the trustee and Lybrand to explore the possibility of settling the trustee's claims against Lybrand. By July of 1965 [fol. 398] it became obvious that no mutually satisfactory settlement was possible. Accordingly, by order of the United States District Court for the Eastern District of New York, the trustee filed a complaint against Lybrand and Harold Roth on July 1, 1965 (65 Civ. 664). The complaint sets forth 22 claims for relief against Lybrand. The complaint is directed against Lybrand's year-end audits of Continental's financial statements for each of the years 1957, 1958, 1959, 1960, 1961 and 1962. The trustee's claims for relief sounds in breach of contract, breach of warranty, negligence and fraud. This civil law suit is in no way con-

nected with the instant criminal indictment except that there is a similarity of subject matter for the year 1962.

Shortly after July 1965, discovery was begun against the defendant Lybrand. Notices of deposition were served and subpoena was issued for the books and records, etc. of Lybrand relating to the audit years in question. Counsel for Lybrand and myself worked out mutually agreeable discovery procedures which included the order of the taking of the depositions of the Lybrand personnel. By July of 1965 the plaintiff had told counsel for Lybrand, and Lybrand fully understood, that the plaintiff intended to depose Mr. Kaiser, Mr. Fishman, Mr. Simon and all other Lybrand personnel connected with the audits in question. In regards to the workpapers and documents on the subpoena, counsel for Lybrand indicated that it would be a great burden to yield to our suggestion that the workpapers be produced subject to subpoena and be impounded in the [fol. 399] Eastern District of New York. As a compromise, counsel offered to produce them by placing them in a conference room and promised to make them available to the plaintiff according to a mutually satisfactory schedule. Accordingly, since July of 1965 these Lybrand documents have been produced pursuant to subpoena and have reposed by convenience in the Tax Conference Room at Lybrand's Offices. They have been made available to both sides. It is these documents that counsel seeks to now deny us.

The above described application for an order ought to be denied on the grounds that such a wide sweeping order would virtually destroy the trustee's opportunity to prosecute his law suit against Lybrand. Moreover, the order is not necessary because the prosecution of the civil case by the trustee would not prevent the defendants and their counsels from preparing adequately for the defense of a criminal proceeding and will not preclude the possibility of a fair trial in this criminal proceeding: The petitioners have utterly failed "in the burden of showing essential unfairness . . . as a demonstrable reality, ..."; they have failed in the required showing of an "identifiable prejudice to the accused."

3. I wish to state unequivocally that at the time of the filing of the complaint and during all the time the above described arrangements were being made, neither the trustee nor counsel had any knowledge whatsoever that there was any criminal investigation going on by the United [fol. 400] States Attorney's Office for the Southern District of New York which related to Lybrand. On information and belief there was at that time no criminal investigation by the United States Attorney's Office. The decision to sue Lybrand was made by the trustee alone upon advice from counsel and had no other purpose or motivation than to seek redress on behalf of the thousands of innocent stockholders and creditors of Continental for civil wrongs which the trustee and counsel felt were Lybrand's responsibilities. I have been in charge of this litigation since its inception and at no time has anyone either in or out of Government ever had any communication with me in regards to the method of prosecuting this law suit. I alone have decided for the trustee the course of this law suit and my decisions have been based upon what I felt was his best interests. I have never had, nor do I now have, any other consideration in the handling of this law suit except to redress the monetary loss suffered by the creditors and stockholders of Continental. Neither I nor the trustee have any interest in the indictment handed down by the Southern District of New York against Kaiser, Simon and Fishman. Well before I had any knowledge of any indictment being handed down in this case, I had indicated to counsel for Lybrand that I intended to examine Mr. Kaiser. Pursuant to normal course, I had already examined Mr. Simon and many other Lybrand personnel. I would have examined Mr. Kaiser earlier, but the pressures of business and other matters of Mr. Kaiser as a Lybrand partner kept him from me. In short, the trustee's decision to examine Mr. Kaiser was [fol. 401] made in the normal course of his own law suit and had absolutely nothing to do with any investigations or indictments stemming from the Southern District of New York.

4. During the course of our litigation, we were told by counsel for Lybrand that its entire file and papers were being made available to the United States Attorney's Office and to the Securities & Exchange Commission. We, in every instance, arranged our schedule so as not to interfere with Lybrand's express desire to make available to the Government all of its documents. Accordingly, I understood from Lybrand's counsel that they made available to Government agencies all of their documents for full and open inspection by the Government. Moreover, I was informed by Lybrand's counsel that Mr. Simon, Mr. Fishman and Mr. Kaiser were appearing from time to time before the United States Grand Jury in and for the Southern District of New York. In the cases of Simon and Kaiser, Mr. Powell Pierpoint informed me that they had appeared before the Grand Jury on several occasions. This was told to me by Mr. Pierpoint so that I could accommodate my schedule to suit his convenience, which I did in every instance. Thus, counsel for Lybrand told me that all of Lybrand's records were made available to the Government and its accountants and told me that Lybrand personnel appeared before a Federal Grand Jury sitting in the Southern District of New York. I view therefore with some surprise Mr. Hill's affidavit wherein he sets forth the fact that he observed what he believed to be documents produced during the [fol. 402] course of our depositions and I cannot understand why he failed to inform the Court that all of Lybrand's records were made available by Mr. Hill and Mr. Pierpoint on behalf of Lybrand to the Government. It seems obvious to me that the real purpose for this unusual procedure is to stop the trustee from gaining information necessary for the prosecution of his law suit—information which Lybrand has already given to the Government. The only person who has not had an opportunity to examine Mr. Kaiser is the trustee. The Government has examined him. Moreover, I have been informed that the Government has already subpoenaed Lybrand's workpapers and they have already been produced for the Government.

5. The trustee, although he has been named as a plaintiff in this proceeding directed at 66 Crim. 831, has no part in, nor does he have any concern with, that indictment and it was improper for counsel to have described him as a plaintiff in that proceeding. Except for some similarity in subject matter, our civil actions have absolutely no connection with, or, for that matter, no concern with, the pending criminal case in the Southern District of New York. Indeed, the only defendant in our case is Lybrand. By no stretch of the imagination can it be said that the prosecution of the civil case in the Eastern District of New York would interfere with, or create a threat to, the power of the United States District Court in and for the Southern District of New York to fully hear and determine all of the issues created as a result of the indictment (66 Crim. 831). As I understand the ALL WRITS STATUTE, its purpose [fol. 403] is to preserve that jurisdiction and not for use as an alternative for motions to suppress evidence. No one can deny the trustee's right to discover evidence necessary for the performance of his duties. No one can make the claim that in our hands the information being developed (information which the defendants have already made available to the Government) is not proper, and I submit it is improper and inappropriate on such a proceeding as this to have us argue the merits of whether or not the Government is entitled to this information. Suffice it to say that we have no interest in the Government's presentation of its criminal case and the Government has no interest in the presentation of our civil case. To test the questions that he raises in connection with the propriety of the Government's use of information developed at the civil trial, he may employ procedures available to him in the Southern District of New York in a proceeding between himself and the Government. We have no business being in such a proceeding.

Moreover, it is obvious that the petitioners are forum-shopping. After the indictment was handed down, a motion for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure was made on behalf of Mr. Robert

Kaiser on the grounds that to continue prosecution of the civil case in light of the indictment of the Southern District would be oppressive and would violate his rights under the Fifth Amendment. Judge Mishler, in a well reasoned opinion, ruled against that application and the Court of Appeals dismissed an application for a stay. It is important to note that on the argument in the Court of Ap- [fol. 404] peals, all the Judges noted that they could see no prejudice to Mr. Kaiser, especially as he had available to him his ability to take the Fifth Amendment. This application is clearly an effort to overrule Judge Mishler's order and the ALL WRITS STATUTE clearly was not meant for that purpose. Kaiser essentially makes the same argument here. He argues that the prejudice which flows from our discovery is, in effect, the fact that the Government may use his testimony on the criminal trial. Although they are artful in not stating it, the true articulation of that argument is that Kaiser is giving testimony which may be used against him. Judge Mishler ruled and the Court of Appeals clearly indicated, that Kaiser's defense against such a difficulty was to take the Fifth Amendment. Kaiser chose not to take the Fifth Amendment and therefore we must conclude that he believes that his testimony will not incriminate him. As far as the petitioners' arguments that it will be oppressive for Kaiser to defend more than one suit, we offer the following information to the Court: Kaiser is represented in the civil case by the firm of Hughes, Hubbard, Blair & Reed; he is represented in the criminal case by the firm of Sullivan & Cromwell. We must therefore conclude that manpower is no problem. Secondly, Mr. Kaiser's involvement in our law suit covers only two audit years—1961 and 1962. As was pointed out by petitioners, Mr. Simon's testimony took a total of 16 days. Mr. Simon was involved in the audit years of 1960, 1961, 1962 and 1963. Therefore, [fol. 405] Mr. Kaiser's testimony should be concluded in substantially half the amount of time. It is my understanding that the petitioners pleaded not guilty in the criminal case and asked for 30 days to file motions. It is obvious

that a criminal case of this size and scope will take many months, if not years, to be concluded. We would do everything in our power to cause the least interference as possible. At any rate, it appears that a week or so of depositions would not be critical to the defense in this case. The nature of the petitioners' sweeping request for relief, namely, to cut the trustee off from proceeding at all for what would probably be several years, indicates that his real desire is to insulate himself from the civil, not the criminal case. The documents that he seeks to withhold from us have been made available to the Government as well as to ourselves. If, indeed, our concurrent examination of these documents conflicts with his examination, the trustee would be willing to undertake the expense of duplicating the documents which already have been turned over to us under subpoena. At no time did Lybrand ever indicate to us that the presence of our accounts interfered with the examination of the Government in the criminal case and their examination in the civil case. To arrange mutually satisfactory times would not be difficult since we are concerned with audit papers for years other than 1962 and it would be no great difficulty to arrange mutually satisfactory schedules. At any rate, if worse came to worse, the trustee would duplicate the 1962 year and thereby remove the conflict.

[fol. 406] 5. This Court ought not to reverse Judge Mishler's outstanding order under the guise of an application under the ALL WRITS STATUTE. This Court ought not to enjoin a civil case in another District because it in no wise threatens the jurisdiction of the Southern-District Court to hear and fully determine all of the issues raised in connection with the criminal case. It is obvious that there will be no substantial prejudice to the petitioners and that what the petitioners really seek is to frustrate the trustee in his civil case and not to protect themselves in a criminal case in which they have already made all of the information they have available to the Government.

The outstanding direction of Judge Mishler: "Robert H. Kaiser is directed to appear and submit to examination at the Clerk's Office in the United States Courthouse, 225 Washington Street, Brooklyn, New York, on Wednesday, October 26th, at 2:00 P.M. . . . " ought not be reversed by this Court by use of a 1651 application.

JOSEPH J. MARCHESO

Sworn to before me this 4th day of November, 1966.

Robert J. Giordano, Notary Public, Qualified Nassau Ct., Filed N. C., Cert. No. 30-6527978, Expires March 31, 1968.

[fol. 407]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Cr. 831

UNITED STATES OF AMERICA

v.

CARL SIMON, et al., Defendants.

AFFIDAVIT OF STEPHEN E. KAUFMAN

State of New York,
County of New York,
Southern District of New York, ss.:

Stephen E. Kaufman, being duly sworn, deposes and says that:

1. I am an Assistant United States Attorney and Chief of the Criminal Division in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York.

[File endorsement omitted]

2. On November 1, 1966, an Order to Show Cause was served upon the Government by the attorneys for the defendants asking it to show cause why the Trustee in Bankruptcy for Continental Vending Machine Corporation should not be enjoined from deposing the above named defendants and others in the United States District Court for the Eastern District of New York. Since the Government was not a party to the action in the Eastern District and since no relief was otherwise requested against it, the Government contended that it should not have been named in the order, and took no position with respect to the merits of the application. On November 1, 1966, the order was signed and the Court requested the Government's presence in court on the return date.

During oral argument on the return date, November 4, [fol. 408] 1966, it was suggested that the Government and the Trustee could be enjoined from communicating with each other. The Court indicated it wanted the Government to state its position to the Court with respect to this suggestion (Transcript of Proceedings on Nov. 4, 1966, 55). This affidavit is filed pursuant to the Court's request.

3. The Government strongly opposes the issuance of any injunction with respect to communication between it and the Trustee. As is made clear by Judge Mishler's opinion denying a stay, the defendants when called before the Trustee have a remedy against affording incriminating admissions—i.e., the invocation of their fifth amendment privilege. Should they testify, their testimony would be a matter of public record and this testimony would in no way be tainted by any illegality. There would therefore be no basis for the Court's enjoining the Government from acquiring this evidence. Furthermore, for the Court to pass upon the admissibility of these prospective depositions would be premature at this time. Should the Government seek to introduce these prospective depositions at trial, defendants can be adequately protected by objecting to this evidence at the trial in which event the Trial Judge

can determine whether the prospective deposition was properly obtained. To pass upon this issue at the present time would be for the Court to give an advisory opinion as to the admissibility of evidence which has not yet been and which may never be introduced.

Secondly, it would be prejudicial to the Government to cut off communications between it and the Trustee or his attorney. Thus it is expected that at trial the Government [fol. 409] will call witnesses employed by the Trustee who have thus far been represented by the attorney for the Trustee at the direction of a Judge of the Eastern District of New York. In addition the Trustee has been engaged for a long period of time in an active and detailed public investigation in this area with regard to his civil case and in fact is the present custodian of all of the books and records of Continental and its subsidiaries. It is respectfully submitted that to deprive the Government of the knowledge which the Trustee has acquired would obstruct the Government in the preparation of this case.

Wherefore, your deponent respectfully submits this affidavit in response to the Court's request.

Stephen E. Kaufman, Assistant United States Attorney.

Sworn to before me this 9th day of November, 1966.

Jack W. Ballen, Notary Public, State of New York, No. 41-0146400, Qualified in Queens County, Term Expires March 30, 1967.

[fol. 410] Affidavit of Mailing (omitted in printing).

[fol. 443] [File endorsement omitted]

[fol. 444]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 831

UNITED STATES OF AMERICA

vs.

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

Transcript of Hearing—November 4, 1966

Before: Hon. Frederick vP. Bryan, District Judge.

New York, N. Y.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney, for the Government, Stephen E. Kaufman, Esq., of counsel; Hugh C. Humphreys, Esq., Assistant United States Attorney, of counsel.

Sullivan & Cromwell, Esqs., Attorneys for Defendants, Marvin Schwartz, Esq., of counsel; and Spear & Hill, Esqs., Thomas W. Hill, Jr., Esq., of counsel.

Christy, Bauman, Frey & Christy, Esqs., Attorneys for Irving L. Wharton, Trustee for Continental Vending Machine Corp. and Continental Afco Corp.; Joseph J. Marcheso, Esq., Arthur H. Christy, Esq., and Robert Giordano, Esq., of counsel.

[fol. 445] Mr. Humphreys: As I pointed out to your Honor recently, the government takes no position in this matter. We are not parties to the civil litigation and we are not being asked to do anything.

The Court: All right. Mr. Schwartz, I will hear from you.

ARGUMENT OF BEHALF OF DEFENDANTS BY MR. SCHWARTZ

Mr. Schwartz: May it please the Court, I think unfairness inherent in the situation which brings us here this morning is not seriously open to question.

Problems affecting concurrent civil and criminal litigation are not new. They have been before this court and other Federal Courts on many occasions over a great number of years.

And while I do not in my every-day practice encounter this problem, we have looked at the books and the authorities assiduously for approximately a week, and I believe it is accurate to say that of the many many courts which have considered this question and many different circumstances, every single court has condemned it, and has taken appropriate steps to prevent the hardship which results to [fol. 446] a criminal defendant from discovery proceedings in a related civil case.

And conversely, on the basis of what we have done, I think that this statement is also true: that no court that has ever considered the risk involved to the defendant in concurrent discovery has refused to act to prevent it or correct it.

Now with unfairness that obvious, as I think it is, in fact, inherent, I think we have three questions before the Court tendered by our motion.

The first is, does the Court have any power to do anything about it.

The second is whether, assuming the appropriateness of injunctive relief, should it extend only to proceedings against my three clients, the individual defendants, or should it go somewhat further to certain of the alleged co-conspirators.

The third question is whether or not Judge Mishler's decision is conclusive of this motion and disposes of it.

On the question of power—

[fol. 447] The Court: I think with respect to Judge Mishler's decision there are two questions. Perhaps first

is whether or not it is conclusive; and the second is whether, if it is not conclusive, this Court should give it effect as a matter of comity.

Mr. Schwartz: I will spend no time at all, your Honor, on the question of power. We deal with it in our memorandum, and I don't think there is any serious question about it.

I would like to make one observation, and that is to quote one paragraph from a decision cited in our brief, United States v. Parrott, in the District of Columbia. Judge Gaff said the following:

"A defendant charged with a crime may seek an injunction to prevent civil proceedings if his testimony at those proceedings would disclose evidence which might be used against him in a criminal charge."

Turning to the second question, whether there should be an injunction not only against proceedings against my clients, but an injunction also against proceedings against [fol. 448] the Lybrand firm and one McDevitt—

The Court: Just let me see how far your request goes. You have three clients here, two of whom are members of the Lybrand firm and one is a senior associate; is that correct?

Mr. Schwartz: Yes, your Honor.

The Court: Your application here is with respect to those three persons that the Trustee be restrained from proceeding further with the deposition and discovery proceedings in the Eastern District.

Mr. Schwartz: Yes, sir.

The Court: Do I understand also that you are requesting here injunctive relief against the Trustee proceeding against the Lybrand firm per se?

Mr. Schwartz: Yes, sir.

The Court: And against any of its partners?

Mr. Schwartz: Yes, your Honor.

The Court: Who is Mr. McDevitt?

Mr. Schwartz: McDevitt is like Mr. Fishman, a senior associate of Lybrand.

[fol. 449] The Court: He is also one of the Lybrand group?

Mr. Schwartz: Yes, sir. I mention him specifically because he is specifically named as a coconspirator in the indictment.

I can only assume, your Honor, that at the trial of this criminal case the government will attempt to offer in evidence against my clients any documents or testimony which is elicited from anyone associated with the Lybrand firm, including but of course not restricted to McDevitt.

The theory, I presume, under which this will be done is that they are alleged coconspirators and any extra judicial admission by any of them—

The Court: May I ask you this, to interrupt you, Mr. Schwartz again: Is the Lybrand firm, apart from McDevitt, or the members of the Lybrand firm, named as conspirators in the indictment?

Mr. Schwartz: The Lybrand firm by name is named as a coconspirator in the indictment.

Now, the effect, your Honor, of continued discovery proceedings against Lybrand—and I am not concerned with [fol. 450] stopping the Trustee from prosecuting its civil lawsuits and taking the deposition of anybody he wants to; I am concerned with his eliciting discovery in the Lybrand firm. Because under the rules of evidence as they relate to conspiracy, anything which is discovered from Lybrand, anything which a Lybrand partner said, could then be offered in this case against my clients as an admission by a coconspirator allegedly in furtherance of a conspiracy.

The Court: That is, assuming that a conspiracy is established.

Mr. Schwartz: Subject to connection, your Honor, and we know what that means.

I don't see, your Honor, great or substantial prejudice to the Trustee. Of course, any lawyer who prosecutes a lawsuit wants to do it his own way at his own pace and at his own time.

But Mr. Marcheso has said that he requires before this trial the testimony of thirty-two different witnesses. I am informed that he has more than twenty to go.

I take it that it will be time enough, assuming this crim-
[fol. 451] inal proceeding is protracted, which I hope it will not be—it will be time enough for Mr. Marcheso to come to this Court or to Judge Mishler or to any appropriate tribunal and say, "I am stymied; I have done everything I can do to prepare for trial, and I am ready for trial, but I must have more testimony from Mr. Kaiser, from Mr. Fishman or from whomever else he needs it."

It will be time enough then to say that the prejudice is so great that it must go into the balance.

And on this question of balance, which I think probably is the crucial question—the balancing of the rights of the defendants against the rights of the Trustee—I think it is appropriate to look at what the Trustee has done in his two days of examination of Mr. Kaiser since the indictment.

As I state in my motion papers, I propose to hand to the Court the two days' testimony of Mr. Kaiser, both days since the indictment.

Now, with great reluctance—

The Court: What do you say is in that rather substan-
[fol. 452] tial volume, Mr. Schwartz?

Mr. Schwartz: I say, your Honor—

The Court: A very brief, compressed summary.

Mr. Schwartz: Weighing my words very carefully, I think what is in 250 pages of transcript is at most twenty-five pages of legitimate discovery. The rest of it, your Honor—and I have read it several times—is badgering the witness; in a veiled manner calling him a liar; taunting him to assert the privilege against self-incrimination—

The Court: Frankly, Mr. Schwartz, I am not concerned with that. If in the civil suit there is some abuse, as you say, of the deposition proceeding, there is only place there is a remedy for that, and that is an application in that case to a Judge in the Eastern District.

The only thing that I am concerned with here is the question of prejudice to this criminal proceeding. And to me, in my way of thinking, that can only arise, if it does arise at all, in relation to the information elicited as distinguished from the attitude of the examining counsel.

[fol. 453] Mr. Schwartz: Well, the information elicited, your Honor, I think it is correct to say, that except for a few pages of background and the witness's position in the firm, the great bulk of it relates to a footnote to the financial statement which is the basis of this indictment—Footnote 2, which is quoted verbatim and alleged verbatim, twice in the indictment; that this has been the sum and substance of all of the testimony.

But if I may make an observation about significance other than information—the manner of questioning. In a civil suit, your Honor, a lawyer can object to the form of the question and you can't instruct a witness not to answer if he doesn't like the form.

What is the effect on a jury in a criminal case of reading into the record a deposition taken in a civil case by a lawyer, who is an officer of the court, and who represents indeed another officer of the court, from which it is apparent from the very words of the question that the questioning lawyer thinks this witness is a liar?

[fol. 454] There are so many questions, your Honor, asked that way in this deposition which a civil judge in a civil case would normally have very little concern with. In the ordinary civil case when I represent a witness who is testifying, I don't much care, I will object to the form.

But what can Mr. Kaiser do then? If his remedy is only in a civil forum, he must be instructed by counsel to refuse to answer on the ground that the lawyer doesn't like the tone of the question. He can then go before the Eastern District under Rule 30 (b) and ask for a protective order. That cannot result in an appealable order, unless he is so confident of his lawyer's judgment that he refuses to testify further.

That in ordinary circumstances is a serious risk for a professional man to take, but I think it unthinkable in this circumstance. I don't think a man accused of a crime, which not only could conceivably deprive him of his liberty, but in this case of his professional life, should be put in a position of exposing himself to a contempt citation in order [fol. 455] to vindicate his lawyer's view of the impropriety of the question.

I think the manner in which this deposition has been conducted has a significance beyond that, because this is a balancing situation: the harm to the defendants against the potential harm to the Trustee, and I think it is appropriate to look at what he has done in the two days.

A hallmark of what he has done for two days, and typical of it, is on page 194. Question, from Mr. Marcheso—

The Court: Wait until I get this so that I can follow you.

Mr. Schwartz: The top of page 194.

The Court: Yes.

Mr. Schwartz:

"Q. While he is looking for that, Mr. Kaiser, let me ask you a question. This answer which I read to you before, did anyone suggest to you that you give that, this kind of an answer to that kind of a question?

"A. No."

Now, if we stop right there, your Honor, I think the unfairness in having that offered in a criminal trial is almost inherent. Here is a lawyer—

[fol. 456] The Court: Let me say this to you, Mr. Schwartz. If anybody tried to offer that question in a criminal trial before me, he would have no more chance of even referring to it before a jury than the man in the moon.

Mr. Schwartz: Your Honor—

The Court: No such question would ever get anywhere near the jury in a criminal trial before me by way of admission or anything else.

Mr. Schwartz: I hope every judge would look at it that way.

The Court: As a matter of fact, if that ever occurred, or if there was ever any such attempt by the United States Attorney, these gentlemen of the United States Attorney's office are sufficiently familiar with me to know—in the first place, I don't think they would try, but I think if they tried it, they would know my reaction very quickly.

Mr. Schwartz: I would hope, your Honor, that would be the reaction of every judge in this court, but I am representing people whose liberty and whose careers are at [fol. 457] stake—

The Court: I understand that.

Mr. Schwartz: And I don't think it is a risk which they should be asked to run.

And at the bottom of the page, what happened time and time again in this deposition, accusations by Mr. Marcheso that Mr. Pierpoint and Mr. Hill are suborning this witness's to perjury. It is not the only page that is there, it is throughout.

I can't believe, of course, that any judge of this court would permit that to be brought to the attention of a jury.

The Court: I see nothing in here, in the page that you are giving me, that could have the slightest relevancy in the trial or would remotely be admissible in the trial.

Mr. Schwartz: I wish, your Honor, there was some way we could obtain advance rulings on this.

The Court: I am afraid you can't, but I would be very much surprised if any of my colleagues in this court permitted even any reference to such testimony to be made [fol. 458] in the presence of the jury.

Mr. Schwartz: I would be happier, your Honor, if the government would say that they would not under any circumstances attempt to offer any of this at the trial, but I don't think they will say it.

Now, apart from the prejudice inherent in the testimony itself is the question of what a lawyer is supposed to do.

The testimony of a man who is indicted in a criminal case is something that has to be worked at with care, the preparation has to be intense; there are literally tens of thousands of documents to review in this case.

And I know that Mr. Marcheso refers in the affidavit, which he served upon me a few minutes ago, that my firm is large, that Hughes, Hubbard represents Lybrand—and incidentally, it does not represent my clients in the civil suit or here, so that statement is in error.

I know that he says we are a large firm, but there is a limit, your Honor, to what counsel can do. And if we have to spend our time sitting by Mr. Kaiser's side day after [fol. 459] day of depositions, next Mr. Fishman day after day of deposition; and because of the doctrines of evidence in conspiracy cases, doing the same with other Lybrand people who are going to testify, there is a limit to how well and how effective we can prepare this case without delaying it—and we don't want delay; we want this case tried as soon as we are ready for the defendants.

Turning to Judge Mishler's decision: The indictment here was filed on October 17th. Before it was handed down there had been an understanding that Mr. Cohen would begin his testimony on October 20.

The Court: Kaiser is the senior associate.

Mr. Schwartz: No, he is—

The Court: He is not a partner?

Mr. Schwartz: The hierarchy is this: Mr. Simon is a general partner, which, as I understand it, is a partner who is entitled to vote for the selection of managing partner and managing committee. Mr. Kaiser is a partner, and Mr. Fishman is what is known as a manager. As a matter of law, they are both partners.

[fol. 460] Faced with that time problem, Mr. Kaiser's counsel were faced with a problem. As a matter of common sense, of comity, respect to the court in which a proceeding is pending, they did the logical thing. They moved under Rule 30 (b) on behalf of Mr. Kaiser, and not on behalf of anyone else, for a stay of that deposition.

Lots of grounds were advanced, including among them that the man wanted his right to retain counsel, give him at least time to consult with trial counsel, before he was forced to take this step.

I think it is significant that the motion was not made on behalf of my client Simon or my client Fishman; that the motion was not related in any way to the broader questions we raised here.

There wasn't any way that Kaiser could raise those questions, because he is not a party in the civil action. All that he could ask for and all he did ask for was a suspension of the deposition—

The Court: Kaiser is not a party?

[fol. 461] Mr. Schwartz: No, sir.

The Court: Is Simon a party?

Mr. Schwartz: Your Honor, none of my three clients are parties.

The Court: They are not parties except that they are in the case qua partners of Lybrand.

Mr. Schwartz: They are not named in the complaint; they resist judgment, and they have not been served; so that any judgment in the civil action, should there be one, would not be enforceable against my clients.

Now, what that means, your Honor, is that the only motion which my people could have made in the Eastern District was a motion under 30 (b), and no defendant could make any motion except one directed to his own deposition.

He had no basis for moving for a stay of the action, or for limiting discovery, except as it related to him individually.

And, as I said before, there is no way in which any motion he makes can result in an appealable order, unless he stands himself in contempt.

[fol. 462] It seems to me clear from reading Judge Mishler's decision that he disposed of the motion on one and only one ground, and that ground is that the privilege against self-incrimination, if it is to be asserted, must be asserted in response to the questions.

The Court: I think that is quite clear. There is no doubt about that doctrine.

Mr. Schwartz: I don't question it.

Now, your Honor, that is not an issue here. If it ever was an issue, it is moot, because Mr. Kaiser has testified for two days; he has testified fully; he has invoked no Fifth Amendment privilege, and he won't.

The only extent to which it is—

The Court: Let me just make sure that I understand you. You say that he won't?

Mr. Schwartz: No, sir.

The Court: All right.

Mr. Schwartz: He can't.

The Court: That is because he is a Certified Public Accountant, among other things.

Mr. Schwartz: He has pride in his reputation, and he thinks that when you are called upon by a court to answer [fol. 463] a question, you should answer it.

The Fifth Amendment is involved in this court on this motion in only one way, and it is not the privilege against self-incrimination aspect of it that is involved. It is involved only in its broader sense. And even if it could be involved, it is moot because he has testified.

The nature of the motion which Kaiser made and the inherent limitations upon what he could do, would have made it impossible for Judge Mishler to consider, even had he wanted to, the very questions which we are raising here, because we are saying here that what is happening is a threat to the conduct of a fair trial in this court.

The appropriate place to make that argument is in the court where the criminal trial is to be had.

All Judge Mishler could decide, and all he did decide, was whether he could, should, or was required to force this witness to make up his mind whether to plead the Fifth Amendment or not.

I think obviously the Court respects the decision of an- [fol. 464] other Court in a related case. Obviously a Court does not lightly ignore it or say it is wrong. But I don't

think any of those are involved here. The question here in this Court is whether without injunctive relief these people can get a fair trial. And I don't think Judge Mishler passed upon that or intended to pass upon it. And I don't think there is any way these people can bring that question to him, except in a very narrow context of his own deposition, and whether or not he should be required to testify and depose or asserting the Fifth Amendment.

At the risk of boring your Honor by repetition, I think the issue here is simply one of balancing, and perhaps Judge Mishler's decision is one factor in the balancing. And I think the balance is the risk of tainting a trial in this case with error and unfairness against some delay, not forever, but some delay of a civil suit.

Bearing in mind that at any time—at any time—when the Trustee has reached a point that he can proceed in no other way except by taking testimony of my clients, he is always free to come to this Court and say that.

[fol. 465] I think the balance, in the interest of this Court in a fair trial, far outweighs any temporary inconvenience which the Trustee would suffer if an injunction were granted.

The Court: I have your position, Mr. Schwartz. Before I hear from Mr. Marcheso, I want to ask Mr. Humphreys a couple of questions. And I may say, Mr. Humphreys, this goes merely to timing.

Mr. Humphreys: Yes, sir.

The Court: This indictment has been returned; has the government any plans with respect to the time of the trial at this time?

Mr. Humphreys: Your Honor, all I can say is that the government does intend to press this case for a speedy trial. I think perhaps your Honor should direct a question to Mr. Schwartz, who may or may not know the answer as yet.

We have motions returnable on the 29th of this month. I am wondering whether or not he is going to ask for additional time; of course, if he is, that would delay the timing here.

The Court: In other words, let us assume for the moment—I will come back to Mr. Schwartz—

[fol. 466] Mr. Humphreys: I really can't predict the time unless I know that, your Honor.

The Court: In other words, is the government ready for trial?

Mr. Humphreys: Your Honor, the government, I expect, will be ready for trial by around February 1st.

The Court: That is what I wanted to know.

Mr. Humphreys: We are actively preparing the case, your Honor, and we could get it out faster, and of course there might be a little more delay than that, but I would estimate around February 1st all things considered.

The Court: Mr. Schwartz?

Mr. Schwartz: Your Honor, our target is trial of the case by early spring.

The Court: By early spring?

Mr. Schwartz: Yes, your Honor.

The Court: Well, as I recall February, spring is not far behind but it is still behind.

Mr. Schwartz: I am thinking in terms of April—March or April. It could be earlier than that, but with one ex-

[fol. 467] ception. My partner, Judge Peck, is going to try this case, and he goes on trial January 2nd in a case which will require six weeks. When he is finished he will be ready to try this case.

The Court: All right. Now I will hear from Mr. Marcheso.

Argument on Behalf of Irving L. Wharton as Trustee by Mr. Marcheso

Mr. Marcheso: Your Honor, I would like to start out by presenting a particular posture that this case comes before you. I want to point out that Judge Mishler was not only the Judge on a Rule 30 (b) motion, but Judge Mishler is a Rule 2 Judge assigned to this case.

The Court: And he also, I take it, is the Judge on the Chapter X?

Mr. Marcheso: That is right, sir. And as I understand it—

The Court: I understand there are two Chapter Xs; is that right?

Mr. Marcheso: Well, Continental and Continental Afco, a subsidiary of Continental, and now it has been consolidated into one Chapter X.

The Court: All right.

Mr. Marcheso: And as I understand it, he was made a [fol. 468] Rule 2 Judge because of the complex issues that arise in a trial of this kind.

The defendants in the Trustee's lawsuit are Lybrand, Ross Bros. and Montgomery, the partnership, and we have on the argument before Judge Mishler—I have heard some of this before—Kaiser was considered a party. Now Mr. Kaiser is not being considered a party.

At any rate, your Honor, that relation is correct; Mr. Kaiser is involved in this lawsuit in that he is a partner of Lybrand, Ross Bros. and Montgomery; and under the new convenient procedural statutes I need not name Kaiser individually; I can name a partnership with the same force and effect as though I would have named him. Under the old procedures, of course, as your Honor knows, I would have had to name him as a named defendant.

The defendants are Lybrand, Ross Bros. and Montgomery, Harold Ross, who has taken the Fifth Amendment on our deposition, and—

The Court: He is not a member of Lybrand?

Mr. Marcheso: No, no.

The Court: He is a former president of the company— [fol. 469] Mr. Marcheso: That's right.

The Court: —who is charged, among other things, with embezzlement.

Mr. Marcheso: That's right.

The Court: Is he under indictment?

Mr. Marcheso: Yes, he is. He is named in the government's indictment as a defendant.

And Meadowbrook National Bank. The Meadowbrook National Bank has settled their claims with the Trustee, so effectively they are not a defendant.

Harold Ross has taken the Fifth Amendment; effectively he is finished as far as we are concerned in the deposition process.

Lybrand, Ross Bros. and Montgomery, of course, has been engaged for many months with us in this civil case.

In addition to this complaint the Trustee has another complaint against other named parties which has not been pressed forward. For purposes of convenience we have combined both actions.

The Court: Are these defendants presently before me [fol. 470] or the Lybrand firm involved in the second consolidated action?

Mr. Marcheso: No.

The Court: They are not?

Mr. Marcheso: No, they are not. Many of these people were brought in because of form. If two, three, four or five year old children were involved, it was ultimately going to be dismissed against them.

The plaintiff that I represent is, of course, a Trustee. He was not a plaintiff who was involved in the activities of—

The Court: Wait a minute. I think, Mr. Marcheso, I thoroughly understand that this is a proceeding brought by a Chapter X Trustee in performance of his official duties. I understand that and all the implications that flow from that.

Mr. Marcheso: Well, I only wanted to make one point in relation to that, your Honor, which has nothing to do with his position as a Trustee, was that Lybrand, Ross Bros. and Montgomery and their working papers are the only place this Trustee can go to find out what happened [fol. 471] in the complicated financial maneuvers for the period of time 1957 to 1962.

The government's indictment, as I understand it, is concerned with late 1961 and all of 1962. Our office is con-

cerned certainly with late 1961 and early 1962, but we are also concerned with the audit years 1957, 1958, 1959, 1961, 1961 and 1962. And our causes of action sound in contract, breach of warranty, negligence, et cetera.

The Court: I have just thumbed through the complaint; it covers the waterfront.

Mr. Marcheso: It covers the audit years from 1957 through 1962, with a cause of action of negligence, breach of contract in each of these years, as well as a conspiracy action.

The Court: I don't mean to interrupt the flow of your argument, but will you address yourself to one question: The initial $64 question, if I may call it that, is whether this court, in which this indictment has been filed, has the power to grant the injunctive relief requested, because obviously if it has not the power, everything we are talking about here is academic. I would like to have you address yourself to the question if you think the Court hasn't got [fol. 472] the power.

Mr. Marcheso: Your Honor—

The Court: Because I am frank to say that I am inclined at this point to think it has, and I may be wrong.

Mr. Marcheso: Your Honor, I have found no cases—I am inclined to think this Court has, and I am in agreement with your Honor, but I am concerned about one thing. First of all, I have only received the papers yesterday afternoon—

The Court: All right.

Mr. Marcheso: But we have been able to find no 1651 cases in which the courts exercised the power; and Mr. Schwartz, although he has assumed that the basic proposition is so simple, has been able to cite no 1651 case in which the court exercised the power in an instance such as this.

So that although, for the purposes of the argument, I do believe the Court has the power, I think the question is, should you move to use this extraordinary power that—

The Court: I think that is the real question.

[fol. 473] Mr. Marcheso: That is the real question in my mind too. And I have been very concerned over the fact—at first I thought maybe our research staff wasn't doing the job that should have been done, but felt better when I received Mr. Schwartz's memorandum—that there isn't a single 1651 case cited where the court did.

In all of the 1651 cases that Mr. Schwartz cites, they represent the traditional use of a court's discretionary injunctive power to protect the res that is in front of them, that is, in front of the court.

In short, what the court was doing in the 1651 cases cited by Mr. Schwartz is protecting the court's jurisdiction to decide a matter before it.

If I can give the Court one example which will apply to all of these 1651 cases that Mr. Schwartz has cited, and that is the City of Fresno vs. Edmondson case, cited in Point 1 of Mr. Schwartz's brief.

There, I believe, the subject of the lawsuit in the issuing court's case were water rights—

[fol. 474] The Court: What was issued?

Mr. Marcheso: The Court issued an injunction to protect the water rights.

The Court: Are there any criminal cases that Mr. Schwartz cites?

Mr. Marcheso: No 1651 case; no, your Honor, there is no criminal case that I can see that Mr. Schwartz cites, which was a criminal case relating to this problem.

What he does in his memorandum is simply this: He cites the 1651 cases to say that the court has injunctive power to protect its jurisdiction about which no one of us is arguing.

He then shifts over to a case called United States v. Parrott. That is a case where the court was concerned with the government's use of depositions in a situation similar to this only in the fact that deposition testimony was involved. That case is a very revealing case, I think, for our problem here.

In that case the government, with knowledge of a criminal referral, had the SEC, an agent of the government, to get a criminal case against the defendant without telling him—[fol. 475] The Court: To get a civil case against him.

Mr. Marcheso: That is right; without telling him that there was a criminal referral. The Judge said, "That's dirty pool; the government should have told him." It was using the civil case—

The Court: I have restrained defendants from prosecuting civil suits against the government during the pendency of criminal proceedings upon the theory that the defendant would thereby get a discovery and inspection that he was not entitled to, which seems to me to be, to some extent the converse of the current proposition.

Mr. Marcheso: It is more apparent than real, your Honor.

If I may continue with the Parrott case, what the Court was saying—and the procedure that was used in Parrott was the procedure that I believe should be used here. It was a motion under 41(e) of the Federal Rules of Criminal Procedure directed against the government's use of these depositions.

Nobody can deny, your Honor, that the depositions in [fol. 476] my hands, although Mr. Schwartz wants to find some fault with some questions on a civil deposition—nobody can deny that the depositions in my hands are licit, are a rightful exercise of the Trustee's duty to go forward.

What Mr. Schwartz is complaining—and one of the reasons that I am complaining that I am a party to this criminal case because I think of confused procedure and confused substantive rights—is that in the hands of the government it might be something different. It might be illicitly obtained in the hands of the government.

If that is so, your Honor, and as Judge Kaufman said when this argument was made before him, "So what, if the government gets the deposition testimony, if Mr. Kaiser does not want to take the Fifth Amendment?"

What Judge Kaufman was doing was articulating a thought: Is there something wrong with it in the government's hands?

I can't answer that question, your Honor. I don't think I should have to either waive the government's rights or [fol. 477] have to put forward the government's rights.

But I say to Mr. Schwartz, the thing to do is, bring a motion under 41 (e), and direct your Honor's power and might not at me in a case where I am appearing before Judge Mishler, but direct your Honor's power and might to the United States Attorney's office, and say, if after a hearing, if after the full facts are developed, this Court finds out that there is something illicit in the government's hands about this testimony, direct yourself to the power against the government, not against us, because in our hands it is perfectly proper.

Now I don't want to anticipate why Mr. Schwartz didn't do that. From my own experience as a prosecutor in the Eastern District, I can guess that he knows that under 41(e), because Kaiser didn't take the stand, he probably will not be able to show that it is illicit in the government's hands.

If he can't do that, the whole purpose of this proceeding is meaningless, because if it is not illicit in the government's hands, it is not illicit in anybody's hands.

[fol. 478] But the effect of the Parrott case was that a Court within its own jurisdiction, within two cases in its own jurisdiction, ruled under 41(e) that the government's conduct in the context of that case was improper. And 41 (e) is the vehicle to use. You have the opportunity for it here.

You have an opportunity to examine fully the claims on both sides, not to summarily decide in the haphazard manner that we are here, on a vague claim that it might be prejudice; and then to overrule or to interfere with an order outstanding in a different court, for I tell you, your Honor, I have heard these same arguments here before Judge Mishler.

Now, he then goes to the Sheppard case—

The Court: I am going to interrupt you. I have a grand jury with indictments and I am going to have them brought in now so that I can discharge them for the day.

(Adjourned to 2:30 P. M.)

[fol. 479] Afternoon Session

Also present:

Silvio J. Mollo, Esq., Stephen E. Kaufman, Esq., and John E. Sprizzo, Esq., Assistant United States Attorneys.

The Court: I see that Mr. Kaufman and Mr. Mollo are here.

Mr. Kaufman: Yes, your Honor.

The Court: I may say that I have been shown gross discourtesy by the United States Attorney's office. Mr. Humphreys was here this morning. I received a message that he had to go uptown on something when I am in the midst of a motion. What sort of a performance is this?

Mr. Kaufman: Your Honor, I—

The Court: This is a motion of singular importance to the administration of justice and with respect to a very important matter coming before the Court, and I get a message from one of your Assistants, sir, that he has an engagement uptown and that he will be back at three-thirty.

You will remain here to take care of the interests of the United States Government, Mr. Kaufman, and Mr. [fol. 480] Mollo will produce any Assistants that are familiar with the matter that are needed to assist you. You will remain here throughout, and if I want to ask you questions, you will be available for questions. That's all.

You may proceed.

Mr. Marcheso: Thank you.

The Court: I certainly do not understand how a message from Mr. Sprizzo, who is your Number 2 man, who leaves a casual message that Mr. Humphreys is going up-

town, is any way to deal with the Court and the United States Attorney's office of the Southern District of New York.

And I suggest, sir, that you take steps in your office to see that nothing of that nature will happen again.

Mr. Kaufman: Your Honor, I would like to be heard, if your Honor would care to hear me on the subject for a moment.

The Court: Yes, I will hear you.

Mr. Kaufman: Your Honor, as I understand from Mr. Sprizzo, he advised your chambers that he would be present in court in Mr. Humphrey's absence and—

[fol. 481] The Court: That is no answer.

Mr. Kaufman: —no discourtesy was ever intended to your Honor at any time, and, of course, I will be here subject to the Court's direction.

The Court: If Mr. Sprizzo is familiar with the matter, you may inform him, Mr. Mollo, to come up here immediately.

We have now on this basis wasted a good twenty minutes or more of the Court's time and the time of all of these counsel.

You may proceed, Mr. Marcheso.

Mr. Marcheso: Thank you, your Honor.

The Court: Before you go on, so that I may be thoroughly familiar with what occurred, I wish you would describe to me precisely what was the nature of this proceeding before the Court of Appeals. I don't quite understand, because here you have a denial of a protective order under Rule 30 (b), who was doing what in the Court of Appeals and under what circumstances?

Mr. Marcheso: Yes, your Honor; as your knows, an application was made before Judge Mishler to move in his discretion to stay taking the testimony of Mr. Kaiser.

[fol. 482] We all at that point knew and agreed that whatever Judge Mishler's ruling in respect to Mr. Kaiser would also apply to Mr. Simon and Mr. Fishman.

Judge Mishler found, after extensive argument, that—

The Court: I know what he found.

Mr. Marcheso: At any rate, he denied the stay. Kaiser's attorney, Mr. Hill, then moved before the Court of Appeals to appeal Judge Mishler's decision and for a temporary stay of Judge Mishler's order directing Mr. Kaiser to appear at two o'clock on Wednesday.

The Court: Moved for a temporary stay on what basis?

Mr. Marcheso: On the basis that he needed the time to perfect an appeal from Judge Mishler's order.

The Court: Well, the order is not appealable.

Mr. Marcheso: They took the position that the order was appealable.

The Court: What did the Court of Appeals do, did the Court of Appeals write, did they decide it from the bench, [fol. 483] or what?

Mr. Marcheso: After listening to extensive argument they decided it from the bench, Judge Lumbard, Judge Kaufman and Judge Moore, denying a stay and directing that the examination go forward that afternoon. And at two o'clock we were back before Judge Mishler, where another application for an adjournment was made before Judge Mishler on pretty much the same general arguments that are being made here.

The Court: The point quite obviously is that the Court of Appeals did not pass on the merits, and could not have passed on the merits, of the application for a stay, because the order is plainly not appealable; and my point is, is the direction of the Court of Appeals of any precedential value in this thing at all?

Mr. Marcheso: Your Honor, I can't really answer that question for this reason: that in our moving papers we moved, on a cross motion, asking the Court of Appeals to exercise its summary jurisdiction of affirmance and to affirm Judge Mishler's opinion below.

It is unclear what happened, for this reason: that the [fol. 484] Court of Appeals took extensive legal argument on the propriety or the prejudice to Mr. Kaiser, especially in regard to whether or not he should appear.

The Court: All right.

Mr. Marcheso: The mandate of the Court of Appeals, although I have not personally seen it, I am pretty sure should dismiss it on the ground—should have denied it on the grounds that it was not an appealable order and then dismissed the appeal.

The Court: I count that as of no significance in this case at all. You may proceed.

Mr. Marcheso: Thank you.

The Court: In other words, I do not consider that the Court of Appeals has ever ruled with respect to any question presented to me.

You may proceed.

Mr. Marcheso: Thank you. Your Honor, just so I might take one sentence or two to get my own thinking back in line: The point that I was trying to make was that in the questions presented by the petitioner, he misses what I believe to be the key question: namely, should this Court [fol. 485] use its extraordinary discretionary power under 1651 in this instance.

He has cited cases which show that under 1651 you have power to grant injunctions to preserve the res of the Court. We don't quarrel with that.

He then goes on to cite the Sheppard case, the recent case wherein the Court of Appeals decided—

The Court: I think, frankly, that the Sheppard case is of some significance here. I am particularly familiar with the Sheppard case.

Mr. Marcheso: That is why I brought it up, your Honor.

The Court: And I am particularly familiar with the whole controversy regarding fair trial, which has recently been the subject of so much public discussion. In fact, I have made an intimate study of that question.

It would seem to me that the Sheppard case and the discussions in the Sheppard case with reference to the inherent power of a criminal court, apart from any statute, to prevent any stay which might interfere with a fair trial, is

[fol. 486] what we are talking about here. We are not talking about statutes of any particular kind or nature.

I believe that this Court has the inherent power to take any steps to insure a fair trial which it may deem advised, absent statute and without having any to do with statute.

Mr. Marcheso: Your Honor, I have no quarrel at this point, as I say, with regard to the jurisdiction or the power of this Court to issue an injunction. What I am saying is that petitioner has excluded from his brief all focus upon the fact of whether or not you should exercise such power.

The Court: That, of course, is the $64 question.

Mr. Marcheso: And in going to the Sheppard case, which I think gives us a direction, which gives us the guidepost—Sheppard, of course, is talking about the inherent power of the trial court, which is almost dictatorial, I think, to preserve the integrity of a case on trial before it.

But there are two things very, very significant about the [fol. 487] Sheppard case. When the Supreme Court begins talking about what should the trial court have done to stop the flow of illicit information from the press to the jury—not through the prosecutor, but around the prosecutor—it began considering alternatives. The Court itself wouldn't go so far as to say, "Mr. Trial Court, you should have enjoined the press."

The Court: No.

Mr. Marcheso: It said, "You should have taken another alternative; protected the Jury by sequestering it."

I am saying, your Honor—

The Court: Let me follow you, Mr. Marcheso.

Mr. Marcheso: Yes, your Honor.

The Court: There is no question in my mind that the Court has no power in such circumstances to restrain the press. However, does it follow from that that the Court has no power over other judicial proceedings which may affect defendants at a trial?

That seems to me to be an entirely different question.

Mr. Marcheso: That is right.

[fol. 488] The Court: The question is a First Amendment question.

Mr. Marcheso: It seems to me that one of the clear implications of what the Supreme Court was saying was: We don't want to take up that question as to whether or not this Court could have issued an injunction.

There is some doubt in that Court's mind. I happen to agree that it would be very difficult for the trial court to do that. But the interesting thing about the Court's decision was, he was telling the trial court judge: Even if you consider that you did have the power, you should start balancing equities, and you didn't have to get into that very, very drastic relief. You could have taken a less drastic relief and directed that the jury be insulated from the prejudicial press statements by sequestering them and putting them in a place where they wouldn't hear these things, and you wouldn't have that problem.

What I am trying to suggest to the Court here is that this Court has alternatives in this matter, and that this Court shouldn't take the very drastic remedy of telling the [fol. 489] Trustee that in this posture and in this stage of your proceedings that you shouldn't go forward at all, because if your Honor reads, and I am sure you will, what is the injunctive relief that they are asking for here, we couldn't move—

The Court: I have read that.

Mr. Marcheso: —an inch.

The Court: The scope of the injunctive relief, of course, is another question.

Mr. Marcheso: Now, the Supreme Court in the Sheppard case—and I must point out another thing to your Honor—in the Sheppard case, what the Court was concerned about was illicit information going from the press around the prosecutor—the prosecutor had no part of it—to the jury.

What we are talking about here is something different. We are talking about here a speculation, that here illicit information will come from the Trustee through the prosecutor to the jury.

Your Honor has more than enough jurisdiction to look at that prosecutor and stop it there, not at the Trustee level. [fol. 490] Your Honor can direct your power to the prosecutor and say, "Stay away from the Trustee. Mr. Trustee, stay away from the prosecutor."

Now, in Sheppard the Supreme Court gave a guidepost that I think is very, very important. It reaffirmed Adams and it said, and I quote—this is just a short quote:

"If the result of the adjudicatory process is not to be set at nought, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice, and that it be sustained not as a matter of speculation, but as a demonstrable reality."

Now the question, I think, is squarely before the Court, or that question is squarely before the Court which was omitted completely from petitioner's brief: What are the claims which show that there is a demonstrable reality of prejudice?

He puts forth only two, and I would like to take the second one first.

He says, as to the books and records of Lybrand—and that is in Point 2 of his brief—and as to the non-indicted [fol. 491] people, there is something wrong with our getting our hands on these records and these working papers.

Your Honor, I submit he hasn't been candid with the Court. In the first place, those records have been in our custody under subpoena since July 15, 1965. We have made a working arrangement with Lybrand, Ross Bros. and Montgomery to keep them at a special room, which was made available for us, and these volumes of work papers—

The Court: Let me ask you this, Mr. Marcheso: I don't take it to be the moving defendants' position here to be that you are not entitled to look at the books and records while this trial is going on?

Mr. Marcheso: Precisely, your Honor.

The Court: That, it seems to me, basically has no merit at all.

Mr. Marcheso: That is precisely the point.

The Court: I understand their position to be that the books and records, if you are using them they can't use them, [fol. 492] and that will prejudice their ability to prepare properly for the trial.

Mr. Marcheso: They make two claims. They make that claim, plus the fact they make the claim that since the government can't get them post-indictment, we shouldn't be able to get them and give them to the government.

Your Honor, this is a perfect example for me making a very important point to us. We don't want them to give them to the government; we want them for our own legitimate needs.

Your Honor can control that situation by saying to the government, "Stay away from them."

Secondly, the government already has these documents under subpoena, and they have already been made available to the government. So what is they are talking about?

The Court: Go on from the documents. I am not frankly very much impressed with the document aspect.

Mr. Marcheso: Excuse me, your Honor, I bring it up only because of the stay which is outstanding, and the stay which I think your Honor has continued.

The Court: I understand that, but go on to the next [fol. 493] point.

Mr. Marcheso: Now, the other demonstrable prejudice that they are trying to show is that there is some sort of prejudice that will come to Kaiser from his testimony.

Your Honor, I submit this is one of the nuts of the argument. You can articulate that argument any artful way you would like, but as a legal factual matter it comes out only one way. And what they are really saying is that if Mr. Kaiser testifies in our proceeding, the government may use Kaiser's testimony against him.

To that, I say to your Honor that that is clearly a Fifth Amendment question. That is the purpose of the Fifth Amendment.

The Court: No, you are not right on that. This is much broader than the Fifth Amendment question.

Mr. Marcheso: I am just saying this part of the argument the government can use—

The Court: No, this part of the argument is much broader than the Fifth Amendment and they don't raise it as a Fifth Amendment question.

Mr. Marcheso: Well, they have shown nothing else in [fol. 494] their brief which indicates that there will be a prejudice to Mr. Kaiser by testifying before us. And indeed, your Honor, I am quite hard pressed to figure out what else it is if it isn't the fact that the government is going to be able to use that testimony against him.

Certainly, just the putting of his testimony on a piece of paper isn't going to do him any prejudice. Certainly, the argument that Mr. Schwartz was making before that in a civil deposition I can ask questions which are not ruled by the use of evidence, because the trial judge is going to rule by the use of evidence and he wouldn't be able to use those questions here.

And more important than that, your Honor, your Honor still has the power to say to the government—to stop the government in the flow of information between the Trustee through the prosecutor to the jury.

The Court: I would like to interrupt at this point and ask Mr. Kaufman to tell me what the government's position would be vis-a-vis such a claim.

[fol. 495]

ARGUMENT ON BEHALF OF GOVERNMENT BY MR. KAUFMAN

Mr. Kaufman: Your Honor, I don't want to start by protesting unfamiliarity, but I am not entirely familiar with the details—

The Court: Who is? Is it Mr. Sprizzo?

Mr. Kaufman: But just to answer your question, I would say this to your Honor: It has been the position of the government throughout this proceeding that it was a motion in litigation between the counsel for the Trustee in

Bankruptcy, appearing in his behalf by Mr. Marcheso, and by counsel for parties in that action who are being deposed by Mr. Marcheso, who are incidentally defendants in a criminal action.

So accordingly the government has a position, which I believe is the right and the only position for us to take, that we are not a party to the instant motion.

Of course, we are here, your Honor, to answer any questions that your Honor may wish to address to us.

The Court: There has been a suggestion, Mr. Kaufman, by Mr. Marcheso that there is at least the possibility of the Court issuing an order forbidding any communication—[fol. 496] as a condition of permitting the Trustee to go forward—between the Trustee and the United States Attorney with respect to any further proceedings affecting these defendants in the civil case.

I am not saying that that is what the Court is prepared to do, but that seems to me to be a rather drastic suggestion and yet perhaps have certain persuasive elements. And I was wondering what the government's position would be vis-a-vis such a suggestion.

In other words, Mr. Kaufman—let me put it this way—this Court is prepared to take any steps which may be necessary to preserve what I call the integrity and ultimate fairness of the trial. I do not say that such a step as was suggested will or will not be done, but assuming that it did, what would the government's position be with respect to such a condition imposed on either a granting or denial of the present motion before me?

Mr. Kaufman: Your Honor, we would, of course, recognize—

The Court: I know you would recognize it if issued, but what would be your position with respect to it?

[fol. 497] Mr. Kaufman: I would need some time to think about that. My initial impression, your Honor, would be that the criminal indictment is independent of these proceedings, whether it be a motion or whether it be an entire proceeding before your Honor. And therefore we would

not have objection to that if your Honor should seek to issue such a drastic remedy in connection with a civil litigation.

What I want to underscore is that we represent the government in a criminal case, which incidentally the defendants are being deposed in a civil matter to which we are not a party.

The Court: I understand that. Of course, I will permit you to fully brief that question, so that you can think it through and give me your position on it. I just wanted to get your initial reaction.

Mr. Marcheso: Your Honor, if I may—

Mr. Kaufman: Excuse me, Mr. Marcheso. By your inquiry, I assume, you are referring, of course, to commu-
[fol. 498] nication in terms of cooperation between the United States Attorney—

The Court: Or indeed, use of any material that would be produced by continued deposition.

Mr. Kaufman: That, your Honor, of course, is a separate question, and I would want to give some thought to it.

The Court: I understand that.

Mr. Kaufman: I don't have any problem with the communication aspect because it is independent. The use of those depositions, of course, would be permissible in a criminal proceeding, if they should be relevant and material to the criminal proceeding, and I would certainly not want to commit the government in any way that would preclude it from the use of those depositions.

The Court: I want you before I decide this motion to express your views quite definitively on that subject.

Mr. Kaufman: Surely, your Honor.

FURTHER ARGUMENT BY MR. MARCHESO

Mr. Marcheso: Your Honor, if I might take this opportunity to make a suggestion that I had intended to save for
[fol. 499] later on in my argument. It seems to me that as long as we are talking about temporary stay now in order

for your Honor to come to certain legal conclusions, it seems to me that the same result in protection of this defendant could be accomplished with the most accommodation to all parties by amending the concept of the stay to be, that pending your Honor's determination there be no communication between the Trustee and the government, and no transfer of materials between the Trustee and the government.

The Court: I don't think it is as easy to solve as that, Mr. Marcheso.

Mr. Marcheso: The point I am trying to make to the Court is this: That this is an extremely inappropriate form and procedure that we have to decide these important questions.

I am suggesting to the Court that Rule 41 (e) is the procedure, where the Court can have the benefit of a hearing, can have the benefit of finding out what is, if anything, being transmitted to the United States Attorney, and can give the government their day in court, to come forward and say, "just a minute, your Honor; after the rights of [fol. 500] the plaintiff and the defendant in a civil case, these are our rights."

We are not deciding any of those issues in the concept of this kind of hearing. They say it is unfair for the United States Attorney to have this information.

The Court: Maybe I will decide that way, I don't know.

Mr. Marcheso: Maybe it is; I don't know whether it is unfair for the United States Attorney to have it or not, and I am not the proper party to be arguing for the United States Attorney.

The Court: That, my dear man, is why I want the United States Attorney here and I want him to be heard.

Mr. Marcheso: But there is no question as to whether it is fair for the information to be in my hands; so the battle really should be not between a criminal defendant—

The Court: No, Mr. Marcheso, you missed the issue. The issue is a very simple one. It is, as you say, a balancing. If there is going to be—I don't say there is—prejudice to

the defendant from the continuation of your depositions, [fol. 501] and such prejudice may arise even though the material is not available to the United States Attorney, if there is such prejudice, then I must balance the constitutional rights of the defendants to a fair trial against any adverse harm that any order I issue here may have on the Trustee.

I may say that if prejudice of a substantial nature is shown, I am fairly well convinced where the balance will lie, because the balance will always lie on the side of protecting a defendant's constitutional rights to a fair trial, in the absence of some very, very compelling circumstances to the contrary.

Mr. Marcheso: Your Honor, I wasn't intending my remarks to be a general statement. I was directing them against the specific claim of prejudice that the testimony may fall into the hands of the United States Attorney's office, and in bar of that specific prejudice, I am saying to your Honor, you can cut off the flow of information between the Trustees and the United States Attorney's office.

That's all I am saying about that. I am not saying that [fol. 502] possibly there aren't other prejudices, if they can demonstrate them, which would require another ruling by your Honor, but in handling the equities, I am taking them one at a time.

The second claim that is in the petitioner's brief is that they can't prepare for trial because two people can't be using the same documents at the same time. The simple answer to that is we will duplicate them and take them out of there.

The Court: That is a question of mechanics; that is all I see; and I don't see that those are any fundamental rights.

Mr. Marcheso: The third issue is whether or not Sullivan & Cromwell—and I think I heard here something but I don't think I heard correctly—Hughes, Hubbard, Blair & Reed represents Lybrand, and as such represented its

partners, and as I understand, still represents its partners and Lybrand on the civil case.

Sullivan & Cromwell represents them on the criminal case, as well as the firm of Spear & Hill.

[fol. 503] I want this fellow for five sessions. Motions aren't even returnable yet. There has been some talk here that February or April. I suggest to your Honor that a case of this complication, there is a clear possibility that it might go over to the summer term or some other time.

I would accommodate my schedule to their every whim; by working Saturdays, working nights, doing anything; to get through with him in those five sessions.

So it appears to me that there is no demonstrable prejudice either in counsel preparing for it with the records, or counsel preparing him for deposition; and there is no demonstrable prejudice which would require this kind of relief to shut off any flow of information between the United States Attorney's office and the Trustee's office.

And I suggest to the Court that pertinent orders can be addressed to the United States Attorney and to me to stop that flow of information.

I say that this is fairly analogous to the problem that the Supreme Court was envisaging as to the directions [fol. 504] to the press, that since this trial court has the United States Attorney as the conduit of the information, you can act directly on the United States Attorney.

It also seems to me that it is not very clear, and although your Honor doesn't feel constrained—and I agree with your Honor—to be influenced by what the Court of Appeals did, I tell your Honor that there was a specific conversation before the Court of Appeals, and they didn't seem to be impressed by the fact that this information may come in the hands of the United States Attorney. As I say, Judge Kaufman said, "So what?"

The point that I am making is that they should demonstrate that to you under a Rule 41 (e) proceeding where everybody has a right to be heard, and the Trustee, who is

no part of this criminal case, be no part of that 41 (e) proceeding.

The Court: We are in a very difficult position here because the Trustee would like to put this in the lap of the United States Attorney and say, "This is an issue between the United States Attorney and the defendants in a crimi-
[fol. 505] nal case." And the United States Attorney, understandably, says, "This is an issue between the Trustee and the defendants and really no concern of ours."

The fact is that both the United States Attorney and the Trustee are here, and I am not going to stand on any technical business here in connection with this. You are both before me, and I will hear both of your points of view.

Mr. Marcheso: Yes, your Honor, but I was directing my argument to the concept that nobody has attacked the validity of that evidence in my hands. The only prejudice that anybody is showing—and indeed, I don't think they have shown that—of course, I am no longer an Assistant United States Attorney; I don't want to argue the government's case—that there is any prejudice in the hands of the government.

But if there is prejudice in the hands of the government, you can cut that off right here. You don't have to go in the terms of the Sheppard case and enjoin the press. You could sequester the jury, in short. What you can do here is cut it off from the Trustee—between the Trustee and
[fol. 506] the United States Attorney.

So that I think that the brief has thoroughly failed to show any real prejudice to this defendant, especially since, your Honor, these people have all appeared before the grand jury.

The Court: When you say "these people," who do you mean?

Mr. Marcheso: I am talking about Simon, Kaiser and Fishman.

The Court: Have they all appeared before the grand jury?

Mr. Marcheso: They have all appeared before the grand jury. The documents have all been made available to the government. What they really are trying to do is to insulate the Trustee—insulate themselves against the Trustee. They are not trying to hide anything from the government.

Mr. Schwartz has told you they are not going to take the Fifth Amendment. If they are not going to take the Fifth Amendment, the government can have all of their records.

I agree with you that the rights of the accused are—[fol. 507] your Honor, I don't mean to misrepresent to your Honor. I may have made one mistake in my last remark. I said that all three have appeared before the grand jury. I have no knowledge of that. I have knowledge that Mr. Simon and Mr. Kaiser have appeared before the grand jury, because during the course of our depositions Mr. Pierpoint had asked me to adjourn it from time to time, the taking of the depositions, because Kaiser and Simon were before the grand jury.

The Court: May I ask you this just as a point of information?

Mr. Marcheso: Yes, sir.

The Court: Do you know, Mr. Schwartz, whether all three of your defendants were before the grand jury?

Mr. Schwartz: Yes, they were, your Honor.

The Court: They were?

Mr. Schwartz: They did not plead the privilege.

The Court: They testified?

Mr. Schwartz: Yes, sir.

[fol. 508] The Court: All right.

Mr. Marcheso: So we must assume that as far as the allegations of the indictment are concerned, the government has already gotten their story from them. The only one who doesn't know what happened is the Trustee.

I may also point out to your Honor that we are interested in years other than the indictment years.

So that it appears to me that the main thrust of this is to keep the Trustee in the dark, not to keep the government in the dark.

The Court: Have I not your position thoroughly?

Mr. Marcheso: Excuse me, your Honor?

The Court: Have I not the essence of your position now?

Mr. Marcheso: Yes, sir.

The Court: Do you wish to be heard briefly, Mr. Schwartz?

Mr. Schwartz: No, your Honor, unless your Honor has a question to ask of me.

The Court: Mr. Kaufman, does the government wish to be heard at all?

[fol. 509] Mr. Kaufman: No, I think I have stated the government's position, your Honor.

The Court: All right.

FURTHER ARGUMENT BY MR. KAUFMAN

Mr. Kaufman: I just would like to add one point, if I may, your Honor.

There seems to be an assumption through Mr. Marcheso's remarks that there has been a mutuality of communication between the government and Mr. Marcheso as attorney for the Trustee. I am not aware of that. It may have existed. At least it has not come to my attention.

The Court: I see.

Mr. Kaufman: So really I am addressing myself to the two aspects of your Honor's question: One, future communication starting as of today with the United States Attorney's office and the attorney for the Trustee. And that, of course, is not a problem if your Honor finds that drastic remedy necessary.

The use of the depositions, of course, your Honor, is an evidentiary right which would be available to the government at the time of the trial of the criminal action; and it would depend, of course, upon the ruling of the trial

[fol. 510] court as to whether that deposition was in any way relevant or material to the criminal proceeding.

Those, of course, are separate issues, and I want to make our position clear, your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Marcheso: Your Honor, if what Mr. Kaufman points out about my language is true, namely, that I may have indicated to the Court that there was some kind of mutuality, believe me, your Honor, I didn't mean that.

The Court: Let me ask you a perfectly frank question.

Mr. Marcheso: Certainly, your Honor.

The Court: I would assume—I may be quite wrong—that the investigation that led to the indictment, or at least part of the investigation that led to the indictment, was investigation originally carried on by the Chapter X Trustee; or was this an entirely independent operation by the government and its own investigation?

Mr. Marcheso: I can't answer whether or not it was—what the government's hand was, but I do know this, your Honor, and in my affidavit submitted here—

The Court: Mind you, don't misunderstand me. I am [fol. 511] not being critical of the Trustee, if he found something that he ought to turn over to the United States Attorney, because that is a perfectly legitimate and proper thing for him to do.

Mr. Marcheso: Your Honor—

Mr. Mollo: I can answer that, Judge. Our case came from the SEC; it did not come from the Trustee.

The Court: All right, thank you, Mr. Mollo.

Mr. Marcheso: Your Honor, I would like to say this: that I started this lawsuit a full year before I even knew that there was any criminal referral.

The Court: All right, you have answered my question.

Mr. Marcheso: That is why I wanted to correct the language about there being any mutuality. There was none in regard to the initiation of any criminal case.

The Court: The question is this, Mr. Marcheso, first of all: I have, I assume, a memorandum from counsel for the criminal defendants.

[fol. 512] Mr. Schwartz: Yes, your Honor.

The Court: Do you want an opportunity to answer them?

Mr. Marcheso: Yes, your Honor.

The Court: How long do you want?

Mr. Marcheso: Would Wednesday be all right?

The Court: That would be satisfactory to me. And Mr. Kaufman or Mr. Mollo, as the case may be—Mr. Kaufman, I assume—would the government like an opportunity to submit any material on this question?

Mr. Kaufman: Your Honor, I think our position has been fully stated, but if we may reserve the right—

The Court: You may reserve the right and you may have anything you desire to submit in my hands by late Wednesday.

Mr. Kaufman: Thank you, your Honor.

The Court: I would like to hear from the government on what I would call the questions of both judicial and United States Attorney policy involved; do you see what I mean?

Mr. Kaufman: We will review the record, your Honor.

[fol. 513] The Court: Review the record and if you have anything to submit, I would be glad to take it, of course.

Mr. Kaufman: Thank you, your Honor.

The Court: In the meantime comes the question of what to do with the question of the temporary stay that I have granted.

I will try to decide this with reasonable promptness. I see no great harm to be done to anybody by continuing the stay.

Unless you have some particular provision in the stay which you consider is particularly prejudicial, I see no reason why the taking of these depositions of the defendants should not be stayed for a few days, because it doesn't seem

to make any difference at all, in view of the importance of the issues here.

Mr. Marcheso: Judge, I can only take the language of the stay as it is before me. I think it is oppressive, and I think the clear language of that stay means that I can do nothing in this lawsuit, even look at documents that are in my own possession, in the full language of that stay.

[fol. 514] It enjoins me from all proceedings related to Lybrand, Ross Bros. and Montgomery.

As I read that stay, I would even be afraid to handle the administration matters if they related to Lybrand.

And let me ask your Honor a question relating to that stay. Suppose that while we are waiting for your Honor to decide this issue, I subpoenaed a witness in relation to the Lybrand case, a former employee of Lybrand, would I be violating the terms of the injunction? The clear words of that order tell me not to.

The Court: I think, Mr. Schwartz, the language of your temporary stay is entirely too broad for our purposes at this time. How are you prepared to modify it?

My view is that with the exception of these particular defendants, or indeed, the production of records—you say you have all this Lybrand, Ross Bros. and Montgomery documents?

Mr. Marcheso: No, your Honor, what I said is this: We subpoenaed these records, and Lybrand produced them [fol. 515] pursuant to the subpoena. As a matter of courtesy and agreement between both counsel, we said that these subpoenaed documents could repose in a special room in Lybrand, and they have always been made available to me.

Under the terms of this order I could not go in and continue looking at these documents, which I have had available to me for several years.

The Court: What do you say to that, Mr. Schwartz?

Mr. Schwartz: I would never resist, your Honor, any request by the Trustee to look at the documents. My prob-

lem is that I want to move them to my office so I can begin to live with them.

The Court: No, the Trustee will continue to have the same access to the documents that he has now, pending the early determination of this motion.

Mr. Marcheso: Would your Honor include in that that the documents are to remain—

The Court: I said the same access as they have now.

Mr. Marcheso: Thank you.

The Court: There will be no change in the posture of [fol. 516] what happened before this order; nor will they be removed by you.

Mr. Schwartz: Of course not.

The Court: That takes care of the documents.

Mr. Marcheso: Your Honor, I take it—I don't want to sound that I am nitpicking here, but I want to be careful not to come under the wrath of the Court by violating any orders.

The Court: I understand your position.

Mr. Marcheso: This would include our previous right of reproducing the documents?

The Court; Yes, they have no objection to that.

Mr. Marcheso: Thank you, your Honor.

The Court: I think that covers the situation. And as far as any outside witnesses are concerned, I am not going to restrain you from examining any outside witnesses you wish. When I say "outside witnesses," at the moment, I mean other than the defendants or partners or employees of Lybrand, Ross Bros. and Montgomery.

Mr. Marcheso: In other words, your Honor is directing— [fol. 517] The Court: At this stage.

Mr. Marcheso: Directing us at this stage that I may not continue my depositions of the named defendants, nor may I continue my examination of the individuals who are presently partners and or employees of Lybrand?

The Court: Yes, that is a purely temporary stay.

Mr. Marcheso: And as far as the records relating to them are concerned, I may have the same access as I presently have?

The Court: The same access that you had before.

Mr. Marcheso: Thank you, your Honor.

The Court: Is that clear?

Mr. Marcheso: Yes, your Honor.

The Court: Is there anything further you want to submit, Mr. Schwartz?

Mr. Schwartz: I may, depending on what Mr. Marcheso submits.

The Court: All right, let us put it this way. I don't want to prolong this matter.

When you receive Mr. Marcheso's memorandum or anything from the government, I will give you until the [fol. 518] following Monday. I say that, it can't interfere with things, because November 11th is that stimulating holiday, Armistice Day, on which day I am in a sentencing institute of this court all day, and then comes Saturday and Sunday, so we will carry it over to that Monday.

Mr. Schwartz: Thank you very much, your Honor.

The Court: All right, gentlemen.

[fol. 519]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 831

UNITED STATES OF AMERICA,

—against—

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

Appearances:

Sullivan & Cromwell, Esqs., New York City; Spear & Hill, Esqs., New York City, Attorneys for Defendants Simon, Kaiser and Fishman, Marvin Schwartz, Esq., Thomas E. Patton, Esq., Thomas W. Hill, Jr., Esq., of Counsel.

Christy, Bauman, Frey & Christy, Esqs., New York City; Attorneys for Irving L. Wharton, Trustee in Reorganization for Continental Vending Machine Corp. and Continental Afco Corp, Joseph J. Marcheso, Esq., Arthur H. Christy, Esq., Robert Giordano, Esq., of Counsel.

Robert M. Morgenthau, Esq., United States Attorney for the Government; Stephen E. Kaufman, Esq., Assistant United States Attorney, Hugh C. Humphreys, Esq., Assistant United States Attorney of Counsel.

[fol. 520]

OPINION—December 12, 1966

Bryan, District Judge:

Defendants Simon, Kaiser and Fishman are certified public accountants, the first two of whom are members of the prominent accounting firm of Lybrand, Ross Bros. & Montgomery (Lybrand), and the third a senior associate of that firm. They have pleaded not guilty to a six count indictment filed on October 17, 1966, charging them with conspiracy to commit mail fraud and to make false statements in violation of the Securities and Exchange Act, 18 U.S.C. §§ 371, 1001, 1341; 15 U.S.C. § 78ff, and with substantive mail fraud offenses. 18 U.S.C. §§ 2, 1341. Ross, former president of Continental Vending Machine Corporation (Continental) is also named as a defendant. The Lybrand firm and others are named as co-conspirators but not as defendants.

These criminal charges arise out of the affairs of Continental and a subsidiary which are presently in proceedings for reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Eastern District of New York.

Defendants Simon, Kaiser and Fishman have applied to this court sitting in the criminal action against them in this district for an order enjoining the Trustee in Reor- [fol. 521] ganization of Continental, pending the trial of the criminal action, from taking their depositions and the

depositions of other partners and employees of the Lybrand firm in two civil actions in the Eastern District of New York (at least one of which involves the same transactions which are the subject of this indictment against them) and for other relief.

Simon, Kaiser and Fishman assert that the injunctive relief which they seek is necessary in order to preserve the integrity and fairness of the criminal proceedings presently pending, to prevent the complete disclosure to the prosecution in advance of trial of their defense and the evidence upon which it will necessarily rest, and to permit them the necessary time and facilities for the intensive preparation required for a proper defense.

I.

The facts out of which this application arises are as follows:

In July 1965 the Trustee in Reorganization of Continental commenced a civil action in the United States District Court for the Eastern District of New York against the Lybrand firm, The Meadowbrook National Bank and Roth seeking damages of $41,000,000 resulting from alleged acts of defendants in connection with the affairs of Continental. The action is being actively prosecuted by the plaintiff [fol. 522] Trustee. Another civil action by the Trustee arising out of the affairs of Continental against a large number of individuals and corporations which was commenced in that District in 1964 is also being actively prosecuted.

For some time the Trustee of Continental has been taking the depositions of witnesses in the pending civil actions in the Eastern District in preparation for trial. Arrangements had been made to take the depositions of Simon, Kaiser and Fishman. Pursuant thereto the deposition of Simon was taken, which ran to some 1,800 pages and is still open for further testimony at this time. The deposition of Kaiser was scheduled. Before it commenced, how-

ever, the present indictment against Simon, Kaiser and Fishman was filed in this court on October 17, 1966.

When the indictment was filed, Kaiser moved in the Trustee's civil actions in the Eastern District before Judge Mishler for a protective order, under Rule 30(b), F.R.C.P., staying Kaiser's deposition on the ground that in view of the newly-instituted criminal action against him in the Southern District the taking of the deposition would violate his fifth amendment privilege against self-incrimination and would therefore be oppressive.

[fol. 523] On October 24, 1966 Judge Mishler denied Kaiser's motion for a protective order in a memorandum decision. In the course of his memorandum he said that it is "clear that transactions on which the civil claims are stated, in the main, form the basis of the criminal charge." The narrow issue posed before him was whether compulsory appearance for examination was oppressive as violating Kaiser's fifth amendment rights against self-incrimination. Noting that counsel for Kaiser had declined to say whether Kaiser would assert his constitutional privilege, Judge Mishler held that the fifth amendment privilege did not excuse Kaiser from appearing for examination; that the privilege could only be asserted in answer to specific questions put to him; that Kaiser was free to assert his privilege when questions which might incriminate were put to him, and that his fifth amendment rights were thus fully protected. Kaiser was directed to appear for examination by the plaintiff Trustee on October 26, 1966. An appeal from Judge Mishler's order was dismissed by the Court of Appeals on the ground that the order was non-appealable and an application for a stay was denied on October 25, 1966. Kaiser then appeared for deposition as directed and was examined by the Trustee's counsel on October 31.

On November 1, 1966, attorneys for Simon, Kaiser and [fol. 524] Fishman as defendants in the criminal action in this court presented to me, sitting in criminal motion part, an order requiring the Continental Trustee and the United

States Attorney for the Southern District of New York to show cause why an injunction should not issue against the Trustee and his attorneys restraining them from taking the testimony of Simon, Kaiser, Fishman or any other partner or employee of Lybrand or from seeking to compel the production of any records of that firm in the civil actions pending in the Eastern District of New York until the trial of the criminal indictment here.

After hearing the attorneys for the Continental Trustee and the United States Attorney, I set down the order to show cause for argument before me in criminal motion part on November 4, 1966, and issued a temporary restraining order against taking the depositions of Simon, Kaiser, Fishman and other partners or employees of Lybrand, pending the hearing of the application. The attorneys for the Continental Trustee and the United States Attorney then accepted service of the order to show cause containing the restraining provisions and the accompanying papers.

November 4, 1966, the return day of the order to show cause, counsel for defendants Simon, Kaiser and Fishman argued in support of the application for injunctive relief [fol. 525] and counsel for the Continental Trustee argued in opposition. The United States Attorney took no position on the merits of the application. At the conclusion of the argument decision was reserved. Time was granted to submit additional papers and briefs[1] and the examination of defendants Simon, Kaiser and Fishman and of partners and employees of Lybrand was enjoined from the bench pending determination of the application.

II.

Does this court, sitting in the criminal action pending against the moving defendants, have the power to grant relief of the nature sought here?

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[1] The last papers submitted in the regular course were received on November 16, 1966, though additional papers were submitted on December 1 and December 9.

There is no doubt that "a fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1954). Moreover, unfairness at any stage of criminal proceedings may affect the fairness of the trial itself and imperil any judgment of conviction under a system of law such as ours which "has always endeavored to prevent even the probability of unfairness." *Ibid.*

It is clear to me that a district court having jurisdiction [fol. 526] over a criminal action, see 18 U.S.C. § 3231; has the power in appropriate circumstances to grant injunctive relief to preserve the fairness and integrity of the criminal proceedings before it. Such power stems from either one or both of two sources.

First, 28 U.S.C. § 1651 (the All Writs Act) provides that United States District Courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." The All Writs Act has been held to have been properly invoked in aid of the jurisdiction of the federal courts in, for example, the areas of bankruptcy, Steelman v. All Continent Corp., 301 U.S. 278 (1937), (injunction against prosecution of suit in another District Court), stockholder litigation, Havner v. Hegnes, 269 Fed. 537 (8 Cir. 1920), (injunction against prosecution of action in State Court) and civil rights. Bulloch v. United States, 265 F. 2d 683, 691 (6 Cir.), *cert. den.*, 360 U.S. 909 (1959). Indeed, the Supreme Court in *Steelman* speaks of the enjoining by the bankruptcy court of suits in other federal courts even "where they have a tendency to embarrass administration * * *." 301 U.S. at 289. It can scarcely be said that federal courts have less power where criminal proceedings are concerned. Thus a federal criminal court is empowered to grant relief affecting other litigation [fol. 527] pending in the federal courts where "necessary and appropriate" to protect the fairness and integrity of criminal proceedings before it.[2]

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[2] See the discussion of the original version of the All Writs Act in Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22-24 (1825); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-25 (1819).

Second, apart from the All Writs Act, the federal criminal court has other powers to grant injunctive relief to protect the fairness of the criminal proceedings before it. Whether this be said to derive from the court's inherent equity jurisdiction,[3] or from its supervisory powers over the administration of criminal justice both generally and under the Federal Rules of Criminal Procedure, is not of great consequence.

As Justice Frankfurter said in McNabb v. United States, 318 U.S. 332, 340 (1943), judicial supervision of the administration of federal criminal justice by the federal courts "implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." See also Mardone v. United States, 308 U.S. 339, 342 (1939).

[fol. 528] The Federal Rules of Criminal Procedure, "intended to provide for the just determination of every criminal proceeding," must be construed by the courts "to secure • • • fairness in administration." Rule 2. And the courts are authorized, if no procedure is specifically prescribed by rule, to "proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Rule 57(b); *cf.* Petition of Petrol Shipping Corp., 360 F. 2d 103 (2 Cir. 1966).

These powers of the federal criminal court are not confined to the protection of an identified federal constitutional right. McNabb v. United States, supra. Nor may these powers be used only against participants in criminal proceedings pending before the court. They extend to policing the requirements of the federal rules in the interests of

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[3] *Cf.* Rudnicki v. McCormack, 210 F. Supp. 905, 909 (D. Mass. 1962), appeal dismissed sub nom. Rudnicki v. Cox, 372 U.S. 226 (1963). See also Landis v. North American Co., 299 U.S. 248 (1936).

fundamental fairness even against persons coming within their jurisdiction who are not parties to proceedings. Rea v. United States, 350 U.S. 214 (1956); see Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); In re No. 32 East 67th Street, 96 F. 2d 153 (2 Cir. 1938). See also Wise v. Henkel, 220 U.S. 556 (1911).

The broad supervisory power vested in the criminal courts to protect proceedings before them against unfairness is dramatically emphasized in a different context by [fol. 529] Justice Clark's recent opinion in Sheppard v. Maxwell, 384 U.S. 333 (1966). That case dealt with the fairness of a state trial judge to fulfill his duty to protect the defendant from inherently prejudicial publicity which saturated the community and to control disruptive influences in and out of the courtroom. A Federal criminal court certainly has at least as much power to prevent "prosecutors, counsel for defense, the accused, witnesses, court staff, [or] enforcement officers coming under the jurisdiction of the court" from engaging in conduct which is likely to result in an unfair trial. 384 U.S. at 363.

The powers vested in the federal courts to protect against unfairness in the administration of federal criminal justice must necessarily extend also to litigants and attorneys in civil actions in the federal courts where the use of federal civil process threatens such unfairness.

III.

When and under what circumstances should such power be exercised? Plainly it should not be invoked without due caution and restraint. The burden of showing the probability of "essential unfairness * * * as a demonstrable reality," Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942), Sheppard v. Maxwell, *supra* at 351-2, rests on the party invoking the power. In all but a few extreme cases prejudice to the accused must be identifiable. Estes v. Texas, 381 U.S. 532, 542-3 (1965). Moreover, as in any [fol. 530] other application for relief in the nature of in-

junction the prejudice to the party seeking relief must be weighed against any prejudice to the persons against whom relief is sought. But upon a proper showing of the probability of unfairness which may affect the course of the criminal proceedings the criminal court has not only the power but the duty to act.

IV.

I turn then to the contentions and the facts on the present application.

(a)

It is not seriously disputed that the subject matter of this indictment and that of the complaint in the civil action against Lybrand are in the main the same. Both charge fraud with respect to a number of the same transactions. It may be noted that this is not a routine criminal case. The indictment, insofar as I am aware, is the first in which charges of mail fraud based on transactions of this nature have been brought against leading certified public accountants. It has received substantial publicity and comment in the press.[4]

[fol. 531] As appears from the complaint and the indictment, these charges involve a very complicated set of facts which resulted in an alleged loss of over forty million dollars to Continental, forcing it into Chapter X proceedings. The difficulty and complexity of the matters involved is to some extent indicated, among other things, by the printed complaint of some fifty pages in the civil action against Lybrand as well by the fact that, as I have mentioned, the deposition of defendant Simon taken before the indictment was returned (and which is still open) has already run to some 1,800 pages. Moreover, the transcript of the two days of testimony of defendant Kaiser, taken

[4] N.Y.Times, Oct. 18, p. 61, L.7; Wall St. Journal, Oct. 18, p. 32, L.2.

before this application was made, shows that the questioning of Kaiser by counsel for the Trustee, largely in the nature of cross-examination, has been sharp and searching.

Defendants Simon, Kaiser and Fishman urge that if their depositions are taken at this time by the Continental Trustee in the pending Eastern District civil actions it is reasonably probable that they will suffer irreparable prejudice in the defense of the criminal action against them and that the resulting unfairness may well impair the integrity of the criminal proceedings. They say that the continuation of these examinations will, in all likelihood, result in a disclosure to the prosecution before trial of [fol. 532] their entire defense in the criminal action; that they will be forced to reveal the nature and details of their defense, the evidence on which it will be based, their trial tactics and strategy and the positions which they will take on the stand; that this will permit the prosecution to circumvent the restrictions on discovery in the Federal Rules of Criminal Procedure; that the prosecution will be given an undue and highly unfair advantage over the defense; and that if injunctive relief is not forthcoming the resulting unfairness is likely to impair the integrity of the trial and to have serious due process implications.

Defendants' position does not rest on protection of their rights against self-incrimination under the fifth amendment. Indeed, counsel for the defendants has flatly stated to the court that the defendants have no intention of asserting their fifth amendment privilege and will not do so under any circumstances. Defendants state that because of their professional position and standing in the business community they are in no position to take the fifth amendment even if they were so minded. They insist that they are wholly innocent of the charges against them, that they wish to have all the relevant facts and circumstances completely brought out in the course of their defense at the proper time, but that they should not be compelled to do so before trial.

The Trustee points to the fact that the Government is [fol. 533] not a party to the civil suit, and that his examinations are not being conducted for the purpose of exposing the defense in the criminal action but for legitimate purposes of the civil suit. As mentioned, the United States Attorney originally did not take any position on the merits of the application. But it is significant that he strenuously opposed the suggestion, made during the course of argument, that there might be an interdiction of any communications between the Trustee and the prosecution concerning the depositions or their subject matter.

It is not denied that during the course of the Trustee's investigations and preparations for trial information affecting the criminal prosecution, transcripts of examination and exhibits have been available to the United States Attorney. That, of course, was entirely proper and to be expected of a diligent prosecutor.

It also can be reasonably anticipated that if the depositions of the moving defendants continue to be taken, the United States Attorney will have full information as to their contents with consequent full disclosure of defendants' case in advance of trial. That there is no deliberate collusion between the Trustee and the United States Attorney's [fol. 534] Office is not controlling. The fact of the matter is that if the examinations of these defendants in the civil action are continued, the prosecution is likely to discover—and make use of—vital information about the defense which it could not otherwise secure. The problem here transcends that of dealing with specific answers to specific questions, which may or may not be adequately handled by the trial court. Rather it relates to the disclosure of the defendants' entire case and the evidence upon which they will rely.

(b)

It is unnecessary to dwell at any length on the wide differences between discovery in civil and criminal cases. The deposition and discovery process in civil litigation rests upon a broad footing of full mutual disclosure of infor-

mation. On the other hand, the Rules of Criminal Procedure restrict disclosures to a minimum. As Judge Wisdom said in Campbell v. Eastland, 307 F.2d 478, 487 (5 Cir. 1962):

> "There is a clear-cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.
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> • • • • • • •
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> "• • • While the Federal Rules of Civil Procedure [fol. 535] have provided a well stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Compare Rules 26 through 37, Fed.R.Civ.P., • • • with Rules 15, 16 and 17, Fed.R.Crim.P., • • •. Separate policies and objectives support these different rules."

The contrasts between the policies and objectives of the civil and criminal procedure are particularly apparent in the provisions of the respective rules relating to depositions. The civil rules permit both sides the broadest latitude in taking the deposition of any person, including a party, on any matter "relevant to the subject matter involved in the pending action." Rule 26(b), F.R.C.P. The scope of examination even extends to the identity and location of persons having knowledge of relevant facts and matters reasonably calculated to lead to the discovery of admissible evidence. Full cross-examination of adverse parties or hostile witnesses is permitted. Rule 26(b), (c), F.R.C.P.

Of course, in criminal cases depositions of parties are not permitted at all and depositions of witnesses are confined to those who are absent, as provided in Rule 15, F.R.Cr.P. What little discovery of documents, statements and tangible objects is allowed to the prosecution, is sub-

ject to severe restrictions even under the liberalized pro-
[fol. 536] visions of new Rule 16.[5]

Thus, while in civil litigation "[t]he way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial," Hickman v. Taylor, 329 U.S. 495, 501 (1947), criminal litigation has made no such concessions to modern concepts. It is still conducted largely on the "sporting" theory of justice. That only serves to emphasize the necessity for the rules of the game being applied equally to both prosecution and defense so that neither can obtain unfair advantage over the other.

If there is reasonable probability that either the prosecution or the defense will be able to secure a full disclosure of the other side's case while relying on the rules to prevent disclosure of its own, there is, as I view it, unfair-
ness likely to affect the result of the trial of such importance and significance as to require the intervention of the crim-
[fol. 537] inal court to ensure the fair administration of criminal justice and the rules governing it.

(c)

The practical effect of denying injunctive relief against the taking of the depositions of the three criminal defendants at this time is likely to permit the prosecution to have full disclosure in contravention of the protections given defendants by the Rules of Criminal Procedure. The

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[5] Rule 16(c) reads in pertinent part:

"(c) Discovery by the Government. *If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule,* it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, *upon a showing of materiality to the preparation of the government's case and that the request is reasonable.*" (emphasis added.)

question to be decided here is whether requiring the defendants to submit to examination in these related civil actions will so prejudice their rights to defend themselves against the criminal charges as to justify this court in using its injunctive powers.

The problem is by no means novel. It has been consistently held that where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter. This has been true whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence, see Campbell v. Eastland, 307 F.2d 478 (5 Cir. 1962), *cert. den.*, 371 U.S. 955 (1963); United States v. $2,437.00 United States Currency, 36 F.R.D. 257 (E.D.N.Y. 1964); United States v. Steffes, 35 F.R.D. 24 [fol. 538] (D. Mont. 1964); United States v. Maine Lobstermen's Association, 22 F.R.D. 199 (D. Maine 1958); United States v. Linen Supply Institute of Greater New York, 18 F.R.D. 452 (S.D.N.Y. 1955); United States v. Bridges, 86 F.Supp. 931 (N.D.Calif. 1949); United States v. A.B. Dick Co., 7 F.R.D. 442 (N.D.Ohio 1947); Zara Contracting Co. v. New York, 256 N.Y.S.2d 98 (3rd Dep't. 1965); United States v. One 1964 Cadillac Coupe, 65 Ad. 762 (S.D.N.Y. 1966); United States v. One 1963 Chevrolet Sedan, Misc. No. 63-M-1239 (E.D.N.Y. 1963), or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution. See Perry v. McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964); Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc., 14 F.R.D. 333 (E.D.Pa.1953); National Discount Corp. v. Holzbaugh, 13 F.R.D. 236 (E.D.Mich.1952). But see Hiss v. Chambers, 8 F.R.D. 480 (D.Md.1948).

The controlling consideration in these cases appears to be the protection of the paramount public interest in ensuring the essential fairness of criminal proceedings under the Rules of Procedure laid down for their conduct. Thus while *Paul Harrigan & Sons, Inc., supra,* seems to be predi-

cated on the probability that the attempted discovery would violate the defendants' fifth amendment privilege against self-incrimination, *Perry* v. *McGuire, supra,* and *National* [fol. 539] *Discount Corp.* v. *Holzbaugh, supra,* apparently were based on the broader ground of the inherent unfairness of compelling disclosure of a criminal defendant's evidence and defenses before trial. And it may be noted that in the many cases where civil discovery has been stayed to prevent disclosure of the evidence to be used by the Government in the criminal prosecution, no fifth amendment self-incrimination question could arise.

It would be wholly unrealistic to suppose that the prosecution in a criminal proceeding would not gain a very substantial advantage over the defendants if the nature of their defense and the evidence on which the defense was based were disclosed to the Government in advance of—and indeed here long in advance of—trial. Every experienced trial lawyer knows well the advantages the prosecution would be likely to gain under *such circumstances.*

With such material at its disposal a zealous prosecutor would be able to tailor his case to overcome anticipated defenses and avoid any possibility of surprise. If the defendants took the stand in their own defense, as appears probable in this case, there will already have been a thorough cross-examination of each of them by able and zealous counsel, a very material advantage to the prosecution in [fol. 540] conducting its own cross-examination. The advantages gained to the prosecution might well be sufficient to tip the scales in favor of conviction particularly in a close case. Under these circumstances the prosecution should not be permitted "to obtain information through the medium of the civil proceedings to which [it was] not entitled, or in a manner in which [it was] not entitled, under the criminal rules." United States v. Maine Lobstermen's Ass'n, 22 F.R.D. 199, 201 (D. Maine 1958); see Campbell v. Eastland, *supra.* This would circumvent the limitations provided by the criminal rules to ensure the fair

administration of criminal justice from the standpoint both of the defense and prosecution.

It is no answer to the contentions raised here to say that injunctive relief should not be granted against the Trustee because the extent of the prejudice or harm which might result to the criminal defendants cannot be presently evaluated in view of the mass of information already available about the transactions which are the subject of the indictment and the civil complaint. That argument defeats itself. The more complicated and voluminous the facts and the more difficult the issues, the more probable it is that such harm may occur.

Nor do the facts that two of the defendants have appeared before the Grand Jury, that Simon has already been examined by the Trustee at length and Kaiser to some ex- [fol. 541] tent, and that other persons connected with Lybrand have also been examined indicate that defendants should be denied relief. Each of the three defendants has been newly-charged individually with serious crimes. It has not been shown here that the full nature and details of their respective individual defenses to those charges have been already exposed. Indeed it is likely that the details of their defenses are still being formulated. It is precisely because it is difficult to forecast the precise harm which may result to the defendants that injunctive relief is necessary for their protection.

Nor is it a solution to the problem raised here to say that defendants could fully protect themselves from any disclosure by raising their fifth amendment privilege against self-incrimination when specific questions are put to them. Not only have they taken the position that they will not assert their fifth amendment privilege but they do not in any way rely on their fifth amendment rights on this application.

The rights on which defendants rely here are those governing the conduct of criminal proceedings with a view to assuring the fair administration of criminal justice to all parties. The supervisory powers of the federal courts over

the administration of criminal justice are not confined to protecting the accused against fifth amendment violations. Thus in McNabb v. United States, *supra,* the Supreme Court did not rest on fifth amendment rights against self-[fol. 542] incrimination as a ground for denying the prosecution the use of incriminating statements by the accused since the statements appeared to have been voluntary. It held, however, that the statements could not be admitted because defendant's statutory rights to a prompt arraignment had been violated. As the Court said, the scope of the power resting in the criminal courts was "not confined to ascertainment of Constitutional validity." 318 U.S. at 340. It held the prosecution was barred from using the state-[fol. 543] ments "[q]uite apart from the Constitution." Id. at 341. See Nardone v. United States, *supra.* Compare Casenote, 76 Harv. L. Rev. 838 (1963).

Similarly, if the search and seizure provisions of Rule 41 of the Rules of Criminal Procedure are violated it is not a prerequisite to relief by the federal criminal court that the violations rise to constitutional dimensions. In Rea v. United States, *supra,* for example, a federal agent was enjoined from testifying in a state criminal trial concerning material obtained by a search and seizure in violation of Rule 41 of the Federal Rules of Criminal Procedure. The court said:

> "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this court and made effective after submission to the Congress. • • • The power of the federal courts extends to policing those requirements and making certain that they are observed." 350 U.S. at 217.

And it went on to say "[t]o enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them." *Ibid.*

I see no reason why a defendant should be compelled to assert his fifth amendment privilege against self-incrimina-

tion against his will in order to protect other and different rights granted him by rule, statute, constitution, or even considerations of basic fairness. The situation presented [fol. 544] here is plainly an unusual one. It is not often that defendants elect to eschew their fifth amendment privilege at whatever cost.* It may be said that though the assertion of the privilege theoretically carries no stigma and in practical effect should not, defendants' election not to take the privilege is quite understandable in the light of much current public reaction. As a matter of "common sense," many disabilities may flow from invocation of the fifth amendment. Hook, Common Sense and the Fifth Amendment (1957); see Ullmann v. United States, 350 U.S. 422, 430-31 (1956). See also Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 468 (1958). I see no reason why defendants should be penalized for electing to relinquish the privilege by being deprived of protection against the violation of other rights resting on an entirely different footing.

Finally, no alternative remedy appears to afford defendants adequate relief in the circumstances. This is a case where the "uncertainty surrounding the adequacy" of available remedies justifies action by the District Court retaining jurisdiction. Township of Hillsborough v. Cromwell, 326 U.S. 620, 626 (1946).

The suggestion that the prosecution should be denied ac- [fol. 545] cess to any depositions of the defendants hereafter taken by the Trustee and that communications between the Trustee and the prosecution regarding such depositions or their subject matter should be forbidden (a suggestion strenuously resisted by the United States Attorney) is an unrealistic approach to the problem. In view of the scope and complexity of the case and the large

* In addition, both Kaiser and Simon, who have already given testimony on deposition, may well be foreclosed from now invoking the fifth amendment in any event by reason of "waiver." E.g., Rogers v. United States, 340 U.S. 367 (1951); Brown v. Walker, 161 U.S. 591 (1896).

amount of relevant testimony and exhibits it would be virtually impossible to isolate the subject matter covered by the depositions from the volume of material to which the prosecution was legitimately entitled. Indeed, were such a direction given it might seriously handicap the prosecution in the legitimate preparation of its case as the United States Attorney has urged. These considerations point up the difficulties which are implicit in this highly unusual situation.

The suggestion that the trial court might suppress the depositions is equally unrealistic and impractical. Even if a motion to suppress would lie under Rule 41(a), F.R.Cr.P. (and this is highly doubtful to say the least), it is likely that it could be granted only on the ground that the prosecution had improperly connived at the taking of the depositions. And if there was such connivance, the defendants would be entitled to relief on their present application. Furthermore, once the depositions of the defendants are taken the cat is out of the bag and the major damage is done. If, [fol. 546] as appears likely, defendants are irreparably prejudiced it may well be too late for the trial court to take corrective measures to ensure the fairness and integrity of the trial.

I find therefore that there is a reasonable probability that defendants Simon, Kaiser and Fishman will suffer sub- [fol. 547] stantial and irreparable prejudice in their defense of the criminal charges against them if the Trustee continues to take their depositions at this time and that it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings.

V.

I recognize that the civil litigation brought by the Continental Trustee in the Eastern District affects the interests of the large number of public shareholders of Continental and that the reorganization of that large corporate entity and its subsidiary under Chapter X of the Bankruptcy Act is to a large degree dependent on the results of that litigation. Any prejudice to these substantial public interests

which may result from delay in taking the depositions of Simon, Kaiser and Fishman or any others in these civil suits must of course be balanced against any prejudice to the criminal defendants if the depositions proceed. However, the Continental Trustee has failed to persuade me that any prejudice of substance will result if the depositions of Simon, Kaiser and Fishman are delayed for a reasonable period.

It is stated in the moving papers, and not denied, that the Trustee intends to take the depositions of some 32 persons in the course of the preparation of the civil litigations in [fol. 548] which he is plaintiff, some twenty of whom are not partners or employees of Lybrand. The deposition of defendant Simon has already been substantially completed. Kaiser's deposition has been commenced. Fishman's is still to come.

Nothing has been shown to me indicating the necessity for any immediate examination of Fishman or the continuance of the examination of Simon and Kaiser at this stage of the civil pre-trial proceedings. The civil case against Lybrand has been pending since August 1965. It appears that it still will be a long time before the depositions of the many witnesses other than Simon, Kaiser and Fishman can be completed. No reason has been advanced why the depositions of the other witnesses and parties cannot proceed expeditiously if the examinations of the three criminal defendants are postponed for a reasonable time. The most that can be said on the facts before me is that the Trustee will be inconvenienced by a delay in examining these three defendants.

I find that when the effect of a reasonable postponement of the defendants' depositions on the civil actions pending in the Eastern District and the public interests there in- [fol. 549] volved is balanced against the prejudice which may result to the defendants from the conduct of such examinations at the present time, the scales are tipped overwhelmingly in defendants' favor.

VI.

It is suggested by the Continental Trustee that Judge Mishler's decision in the Eastern District civil litigation denying Kaiser's motion for a protective order under Rule 30(b), F.R.C.P., should control the present application. I do not agree.

Of course Judge Mishler's decision deals only with a motion of defendant Kaiser. Neither Simon nor Fishman have made any applications in the civil suits and plainly as individual criminal defendants could not be bound by any decision on a motion by another.

As to Kaiser, the issues before me are different from and much broader than those passed upon by Judge Mishler. As I have previously mentioned, the question before him was whether appearance by Kaiser for examination would be oppressive because it would be in violation of his fifth amendment rights against self-incrimination. Judge Mishler held only that the fifth amendment privilege did not protect against appearance for examination but must [fol. 550] be asserted in response to specific questions put to the witness. He denied Kaiser's motion for a protective order under Rule 30(b) on that ground.

Since then the three criminal defendants have made it clear that none of them will assert his fifth amendment privilege.

As the previous discussion has indicated, the questions posed before me on the present application are not questions relating to fifth amendment rights against self-incrimination. They concern the different rights of the defendants to a fair criminal trial under the procedures provided by the Rules of Criminal Procedure. They involve the power and the duty of the federal criminal court to protect such rights and to take such action as may be necessary to prevent unfairness in the criminal proceedings before it—unfairness that well may also have due process implications which cannot be accurately forecast at this writing.

Having found that it is reasonably probable that if these depositions are taken now essential unfairness will result which will threaten the integrity of the criminal proceedings, this court may not shirk its duty to protect the crim- [fol. 551] inal process before it from that probability.

VII.

Thus far the discussion has been concerned mainly with the depositions of the three criminal defendants. The application of the defendants seeks additional relief going considerably beyond those three depositions. Those claims must also be disposed of.

(a) Defendants ask that the Trustee be enjoined from examining any other partners or employees of the Lybrand firm which is named in the indictment as a co-conspirator. It has not been demonstrated to me that any substantial prejudice to the defendants is likely to accrue if such examinations are continued by the Trustee, in the light of the information already made available by the firm. The Trustee will not be barred from taking the depositions of any persons other than the three criminal defendants.

(b) Defendants ask that the Lybrand files, now held by agreement in a conference room at the Lybrand offices and available equally to counsel for the Lybrand firm and the Trustee, should for all practical purposes be placed in the sole custody of the defendants or their counsel. These files and documents appear to have been fully available at all times to the Trustee, and indeed, to the Government. There [fol. 552] is no reason why they should not continue to be held as they now are under presently existing arrangements.

(c) Defendants urge that unless the examinations of other Lybrand partners and employees are stayed and the Lybrand files and documents are made available exclusively to them and their counsel, they will be unable properly to prepare for trial. I see no reason why this should be so.

Depositions can only be taken one at a time. There should be ample time for counsel for the defendants to confer with any Lybrand partners or employees. The Trustee is prepared to cooperate in making any documents which are needed fully available for use and study in aid of the criminal defense. The criminal defendants have ample legal manpower at their disposal. There is no likelihood that the defendants' preparation for trial will be unduly hampered by the continuation of the Trustee's examinations of Lybrand partners and employees or from continuation of the present arrangement with respect to the Lybrand documents. No injunctive relief on these grounds is justified.

VIII.

There remains the question of remedy to be afforded Simon, Kaiser and Fishman.

In fashioning such remedy it is plainly important that [fol. 553] there be a minimum of interference with the conduct of the civil actions by the Continental Trustee.

As I have indicated a reasonable postponement of the depositions of the individual criminal defendants does not appear to be much more than an inconvenience to the Trustee and his counsel and will not substantially affect the orderly progress of the civil actions.

Both the prosecution and the defendants have stated that they wish to try the criminal case in this court as promptly as possible. The Government estimates that it will be ready for trial by mid-February 1967. The defendants expect to be ready by early April. Given maximum efforts by both sides to complete their preparation for trial, it can be expected that the criminal trial could get under way some time between those dates, or perhaps even earlier.

Taking into account all the circumstances here, the Trustee will be enjoined for a period of ninety (90) days from the date of the order to be entered on this opinion from continuing the depositions of defendants Simon and Kaiser and from taking the deposition of Fishman in the civil actions in the Eastern District. At the conclusion of that pe-

riod defendants may apply for further relief with respect [fol. 554] to such depositions on good cause shown.

Beyond this all other injunctive relief which the defendants seek is denied and any and all other restraints upon the Trustee hitherto imposed are hereby dissolved.

An order will be settled so providing on two (2) days notice.

The foregoing opinion constitutes my findings of fact and conclusions of law on this application for injunctive relief.

Dated: New York, N. Y., December 12, 1966.

Frederick vP. Bryan, United States District Judge.

[fol. 574]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Crim. 831

THE UNITED STATES OF AMERICA,

—vs—

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

ORDER—December 16, 1966

The defendants Carl J. Simon, Robert H. Kaiser and Melvin S. Fishman having moved by order to show cause entered November 2, 1966 for an order staying and enjoining Irving L. Wharton, as Trustee in reorganization of Continental Vending Machine Corp. and Continental Apco, Inc. in a proceeding pending under Chapter X of the Bankruptcy Act in the United States District Court

[File endorsement omitted]

for the Eastern District of New York, his attorneys and agents from the further prosecution of any and all suits or claims against Lybrand, Ross Bros. & Montgomery, and from taking the testimony before trial of or compelling the production of documents from defendants Simon, Kaiser and Fishman or any other partner or employee of Lybrand, Ross Bros. & Montgomery, and said motion having been heard on November 4, 1966, and the Court having heard Marvin Schwartz, Esq. in support of said motion, Joseph J. Marcheso, Esq. in opposition to said motion and Stephen E. Kaufman, Esq., Silvio J. Mollo, Esq., John E. Sprizzo, Esq. and Hugh C. Humphreys, Esq. on behalf of the United States with respect to said motion, and the [fol. 575] Court having rendered its opinion dated December 12, 1966 and due deliberation having been had,

Now, Therefore, upon the indictment herein, said order to show cause entered November 2, 1966, the affidavit of Marvin Schwartz, Esq., sworn to November 1, 1966, the affidavit of Thomas W. Hill, Jr., sworn to November 1, 1966, the affidavit of Joseph J. Marcheso, Esq., sworn to November 4, 1966, the affidavit of Stephen E. Kaufman, sworn to November 9, 1966, the deposition testimony given by the defendant Kaiser on October 26, 1966 and October 31, 1966, and upon all prior proceedings had and papers filed herein, it is

Ordered, Adjudged and Decreed, that the temporary restraining order granted on November 1, 1966, upon the signing of the order to show cause as extended and modified on November 4, 1966, upon the argument of this application, is hereby vacated; and it is further

Ordered, Adjudged and Decreed that that portion of the defendants' motion which sought to enjoin the Trustee and his attorneys and agents from the further prosecution of any and all claims or suits against Lybrand, Ross Bros. & Montgomery is denied; and it is further

Ordered, Adjudged and Decreed, that that portion of the defendants' motion which sought to enjoin the Trustee

and his attorneys and agents from taking the testimony before trial of any employee or partner of Lybrand, Ross Bros. & Montgomery other than the defendants, is denied; and it is further

[fol. 576] Ordered, Adjudged and Decreed, that that portion of the defendants' motion which sought to enjoin the Trustee and his attorneys and agents from compelling the production of documents from any partner or employee of Lybrand, Ross Bros. & Montgomery is denied and those files which have been held by agreement in a conference room in the offices of Lybrand, Ross Bros. & Montgomery and have been kept available equally to counsel for Lybrand, Ross Bros. & Montgomery and the Trustee, shall continue to be held as they now are under present existing arrangements; and it is further

Ordered, Adjudged and Decreed, that that portion of the defendants' motion which sought an order enjoining the Trustee and his attorneys and agents from taking of the testimony before trial of the defendants Carl J. Simon, Robert H. Kaiser and Melvin S. Fishman is granted to the extent that the Trustee and his attorneys and agents are hereby enjoined until and including March 17, 1967, from continuing the depositions of defendants Carl J. Simon and Robert H. Kaiser and from taking the deposition of Melvin S. Fishman in the civil actions in the Eastern District entitled Wharton v. Lybrand et al., 65 Civ. 664, and Wharton v. Roth, et al., 64 Civ. 946. At the conclusion of that period, the moving defendants may apply for further relief with respect to those depositions on good cause shown; and it is further

Ordered, Adjudged and Decreed, that the opinion of the Court, dated December 12, 1966, shall constitute the findings of fact and conclusions of law on this application for injunctive relief.

Dated: New York, New York, December 16th, 1966.

Frederick vP. Bryan, U.S.D.J.

[fol. 577] Proof of Service (omitted in printing).

[fol. 578]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Crim. 831

UNITED STATES OF AMERICA,

—against—

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

NOTICE OF APPEAL—Filed December 20, 1966

Sirs:

Notice Is Hereby given that Irving L. Wharton, Trustee in proceedings for the reorganization of Continental Vending Machine Corp. and Continental Apco Inc. and plaintiff in two civil actions pending in the Eastern District of New York, entitled Wharton v. Roth, et al. (64 Civ. 946) and Wharton v. Lybrand, Ross Bros. & Montgomery, et al. (65 Civ. 664), hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order of the Honorable Frederick vP. Bryan, District Judge, Southern District of New York, dated and entered on December 16, 1966, and so much of the opinion of the Honorable Frederick vP. Bryan, dated and filed on December 12, 1966, as grants the motion of defendants Carl Simon, Robert Kaiser and Melvin Fishman for an injunction against said Irving L. Wharton, enjoining Irving L. Wharton and his attorneys and agents, until and including March 17, 1967, from continuing the depositions of the above defendants Simon and Kaiser, and from taking the deposition of the above defendant Fishman in the above described

[fol. 579] civil actions in the Eastern District, and so much

[File endorsement omitted]

of said opinion and order as further provides that at the conclusion of such injunctive period, which period extends to and includes March 17, 1967, those defendants may apply for further relief with respect to such depositions on good cause shown.

Dated: New York, New York, December 16, 1966.

Yours, etc.

Christy, Bauman & Christy, Attorneys for Irving L. Wharton, Trustee, Office & P. O. Address, 45 Rockefeller Plaza, New York, N. Y. 10020.

To:

Sullivan & Cromwell, Esqs., Attorneys for Defendants Simon, Kaiser and Fishman, Office & P. O. Address, 48 Wall Street, New York, N. Y. 10005.

Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York.

Clerk of the United States Court of Appeals for the Second Circuit.

[fol. 580] Acknowledgment of Service (omitted in printing).

[fol. 581]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 337—September Term, 1966.

Argued February 7, 1967.

Docket No. 31012

UNITED STATES OF AMERICA, Plaintiff,

v.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN, Defendants-Appellees,

and

HAROLD ROTH, Defendant.

IRVING L. WHARTON, Appellant.

Before: Lumbard, Chief Judge, Smith and Feinberg, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Frederick vanPelt Bryan, J., 262 F. Supp. 64, enjoining the plaintiff in an action pending in the Eastern District of New York for a period of ninety days from taking the depositions of three defendants named in an indictment pending in the Southern District of New York.

Reversed.

[fol. 582] Marvin Schwartz, New York, N. Y. (Thomas E. Patton, Sullivan & Cromwell, New York, N. Y., on the brief), for defendants-appellees.

Joseph J. Marcheso, New York, N. Y. (Robert Giordano, Christy, Bauman, Frey & Christy, New York, N. Y., on the brief), for appellant.

OPINION—Decided March 3, 1967

LUMBARD, Chief Judge:

The question on this appeal is whether there is sufficient basis for an order entered by Judge Bryan in the Southern District of New York on December 16, 1966, enjoining Irving L. Wharton, trustee in the bankruptcy receivership of Continental Vending Machine Corporation in the Eastern District of New York, for a period of ninety days from taking the depositions in an action pending in the Eastern District since July 1965 of the three defendant-appellees, who are named in an indictment filed in the Southern District on October 17, 1966, which involves in part the same facts as the Eastern District action.

Judge Mishler, the Rule 2 judge in the Eastern District action,[1] had on October 24, 1966 denied an application made by the defendant-appellee Kaiser after the indictment was filed for a protective order under Fed. R. Civ. P. 30(b), staying his deposition on the ground that it was oppressive and violated his Fifth Amendment privilege against self-incrimination. Judge Mishler observed that Kaiser could [fol. 583] assert his privilege in response to specific questions at the deposition. None of the appellees has invoked the privilege against self-incrimination at any point.

Although the indictment was returned in October 1966, no date has been set for the criminal trial in the Southern District. As appellees have made no showing that the taking of the depositions would interfere with the trial of the indictment or with the preparation of their defense in that trial, we reverse Judge Bryan's order.

It is conceded that the trustee is diligently pressing forward the preparation of the Eastern District action for

[1] General Rule 2(b) of the Eastern District provides in part:

"The chief judge with the approval of his associate judges, upon his own motion or the motion of any party, may assign a long and complicated case to a judge for all purposes including the following: (1) to hear all motions and preliminary applications; (2) to conduct the pre-trial conference; and (3) to preside at the trial of the action."

trial, that he is seeking in good faith to take appellees' depositions for purposes of that action, and that the depositions are essential to his preparation for trial. An involuntary petition for the reorganization of Continental Vending Machine Corporation under Chapter X of the Bankruptcy Act was granted by Judge Mishler in July 1963, and Irving L. Wharton was appointed and qualified as trustee.[2] On July 1, 1965, the trustee commenced a civil action in the Eastern District against the accounting firm of Lybrand, Ross Bros. & Montgomery, Harold Roth, the former president of Continental, and the Meadowbrook National Bank, seeking damages for an alleged conspiracy to despoil Continental's assets and to conceal the despoliation by means including the certification of false financial statements by Lybrand for the audit years 1958 through 1962, and for alleged negligence and recklessness of Lybrand and others in permitting the alleged despoliation. This action was consolidated with one brought in September 1964 [fol. 584] against Roth, various officers and directors of Continental, and others (but not against Lybrand, pending settlement talks which later failed), and the consolidated actions were assigned to Judge Mishler as the Rule 2 judge for all purposes.

The trustee has expended substantial sums for legal and accounting fees in the discovery proceedings against Lybrand, which began shortly after July 1965. All Lybrand's books and records relating to the audit years in question have been made available to the trustee, and Lybrand personnel have been deposed, including the appellee Simon, the Lybrand partner in charge of the Continental engagement from 1960 to 1963, whose deposition is still open. The deposition of the appellee Kaiser, another Lybrand partner connected with the Continental engagement, had been sched-

[2] John P. Campbell, who had been appointed conservator of Continental's assets on complaint of the Securities and Exchange Commission by Judge Bonsal in the Southern District in April 1963, was appointed co-trustee with Wharton. Since Campbell's resignation in September 1964, Wharton has acted as sole trustee.

uled to begin October 20, 1966 when the Southern District indictment was returned on October 17, 1966.

The indictment charged Roth and the appellees Simon, Kaiser, and Fishman in six counts with mail fraud, 62 Stat. 763 (1948), as amended, 18 U. S. C. §1341, and conspiracy to commit mail fraud and to file a willfully false and misleading report with the Securities and Exchange Commission in violation of 48 Stat. 904 (1934), as amended, 15 U. S. C. §78ff, 62 Stat. 749 (1948), 18 U. S. C. §1001, by certifying, mailing, and filing a materially false and misleading balance sheet for Continental for the audit year 1962. All of the statements in Continental's 1962 balance sheet alleged by the indictment to be false and misleading would seem to be material to the trustee's actions, and at least two are specifically alleged in the trustee's July 1965 complaint.

After Judge Mishler had denied the appellee Kaiser's application for a protective order staying his deposition on October 24, 1966, Kaiser was deposed at two sessions on [fol. 585] October 26 and 31, 1966. The appellees then moved before Judge Bryan on November 1, 1966 for an order enjoining the trustee from taking their depositions prior to the Southern District criminal trial. At the hearing of this motion on November 4, 1966, Judge Bryan issued a temporary restraining order pending its determination. On December 5, 1966, without application by the trustee, Judge Mishler directed Kaiser to appear for a continued deposition. This Court on December 8, 1966 stayed Judge Mishler's order until December 12, 1966, and after Judge Bryan's decision on December 12 further stayed Judge Mishler's order pending the expedited hearing and determination of any appeal from Judge Bryan's order of December 16, which appeal was later perfected and is now before us.

Judge Bryan held that he had the power to enjoin the trustee from taking the appellees' depositions both under the All Writs Act, 62 Stat. 944 (1948), as amended, 28 U. S. C. §1651(a), and in exercise of the court's supervisory

power over the administration of federal criminal justice. See, e.g., *McNabb* v. *United States,* 318 U. S. 332, 340-41 (1943). He concluded that this power should be exercised because "it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings" if the prosecution is permitted to use appellees' deposition testimony when it could not under the Federal Rules of Criminal Procedure obtain criminal discovery against them. 262 F. Supp. 64 (S. D. N. Y. 1966).

Both holdings present questions of first impression. No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, either under the All Writs Act, compare *Steelman* v. *All Continent Corp.,* 301 U. S. 278 (1937) (injunction restraining action against trustee in bankruptcy), or under the supervisory [fol. 586] power, which the Supreme Court has implemented by formulating rules for the conduct of criminal trials, e.g., *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966); *McNabb* v. *United States, supra,* or by enjoining the commission of acts by "federal law enforcement agencies." *Rea* v. *United States,* 350 U. S. 214, 217 (1956). We assume without deciding that the lower court had power to issue such an injunction, but we hold that it should not have done so, as there is no showing that the depositions sought by the trustee would interfere with the trial of the indictment or the appellees' preparation of their defense.

This appeal requires us to balance appellees' desire to prevent pretrial disclosure of their factual contentions to the prosecution in the Southern District criminal proceeding, without asserting their Fifth Amendment privileges against self-incrimination, against the interest of the trustee, representing numerous creditors and public security holders of Continental, in the expeditious progress of the Eastern District action. The trustee requires the appellees' deposition testimony to complete his preparation for the trial of the Eastern District action, which must be resolved before the bankruptcy reorganization of Continental, al-

ready three and one-half years old, can be completed. It is conceded that the trustee seeks in good faith to depose appellees for purposes of the Eastern District action, and that there has been no consultation on lines of questioning between the trustee and the United States Attorney for the Southern District.

Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privileges against self-incrimination. It could hardly be contended, and appellees do not contend, that the prosecu- [fol. 587] tion in the Southern District could be enjoined from using the deposition testimony given by the appellee Simon before the Southern District indictment was returned. As long as appellees' preparation for the Southern District criminal trial is not hampered, we see no valid distinction in the fact that appellees' remaining depositions could not be scheduled until after the indictment was returned. In both cases, if appellees choose not to assert their privileges against self-incrimination, we see no reason why their testimony should be withheld from the trustee. The fact that additional testimony thereby becomes available to the government is merely the natural byproduct of another judicial proceeding; and to that extent it might be "discovery," but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees. Indeed the constitutional rights of the appellees are unimpaired; here they are in suspension because the appellees have not chosen to avail themselves of their Fifth Amendment privileges.

It is true that appellees have testified in the trustee's depositions and before the grand jury that indicted them without asserting their privileges against self-incrimination. Since, however, "it is well established that a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceed-

ing," *United States* v. *Miranti*, 253 F. 2d 135, 139 (2 Cir. 1958); see 8 Wigmore, Evidence §2276, at 470-72 (McNaughton rev. 1961), the appellees Kaiser and Fishman certainly, and Simon probably, could have interposed the privilege when the trustee sought to depose them after the indictment was returned.

Appellees urge that, as accountants, they "would lose their professional lives" by invoking the privilege. We [fol. 588] are not sure that they would, if it were made clear that the privilege was claimed only on advice of counsel in order to prevent pretrial disclosure of their factual contentions. Whether or not they would, however, the same dilemma is faced by any witness in a civil or criminal trial who is himself under investigation or indictment for other crimes. Such a witness must either invoke his privilege against self-incrimination, or assume "the general duty to give what testimony one is capable of giving." See 8 Wigmore, Evidence §2192 (McNaughton rev. 1961). It is for the same reason that a witness who has been given immunity from prosecution must testify although his testimony may expose him to such extralegal pressures as "loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium." *Ullmann* v. *United States*, 350 U. S. 422, 430 (1955); see *Piemonte* v. *United States*, 367 U. S. 556 (1961). We cannot agree that "civilized standards of procedure and evidence," *McNabb* v. *United States, supra* at 340, require that a witness under indictment be given the option of nonappearance in any proceedings in related civil or criminal cases until his own trial is concluded.

We are also led to reverse Judge Bryan's order by the consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Espe-

cially as a defendant called upon to depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should [fol. 589] enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here.

Judge Bryan relied heavily upon two lines of cases in which "it has been consistently held that where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter . . . . whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence," citing, for example, *Campbell* v. *Eastland*, 307 F. 2d 478 (5 Cir. 1962), cert. denied, 371 U. S. 955 (1963), "or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution," citing *Perry* v. *McGuire*, 36 F. R. D. 272 (S. D. N. Y. 1964), *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil Co., Inc.*, 14 F. R. D. 333 (E. D. Pa. 1953), and *National Discount Corp.* v. *Holzbaugh*, 13 F. R. D. 236 (E. D. Mich. 1952). 262 F. Supp. at 74.

Both lines of cases seem to us to be inapposite. Cases where the criminal defendant seeks disclosure of the government's evidence, or the government seeks disclosure of the defendant's, are distinguishable because here the trustee, who seeks to depose appellees, is pursuing an independent action on behalf of Continental's creditors and security holders, which was commenced more than one year before the indictment was found. And the cases in the second line appear to us, as they did to Judge Mishler in his opinion of October 24, 1966, to rest upon the deponent's assertion of his privilege against self-incrimination; to the extent that they do not, we decline to follow them. In both *National Discount Corp.* v. *Holzbaugh, supra*, and *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil, Inc., supra*, the deponents explicitly asserted their privileges against self-

[fol. 590] incrimination, and the court in *Perry* v. *McGuire*, *supra*, cited both cases in holding that interrogatories directed to a criminal defendant "would be oppressive and would infringe on his constitutional rights." 36 F. R. D. at 273. Moreover, all three cases arose on Rule 30(b) motions made in the court in which the civil action was pending; none is a precedent for the injunction Judge Bryan issued.

Of course, if the district court should find that the taking of the depositions of the appellees threatens to interfere with the trial of the indictment or with such preparation of their defenses by the appellees, as may be necessary, the district court has the power to take appropriate action.

Reversed. The mandate shall go down forthwith.

FEINBERG, Circuit Judge (dissenting):

I dissent.

I would have affirmed on the basis of Judge Bryan's thorough opinion in the trial court. The next best thing to do is to dissent on the basis of that opinion, which is reported at 262 F. Supp. 64. It should be read in conjunction with the majority opinion because Judge Bryan clearly and convincingly states the reasons for the ninety-day injunction under attack. I adopt his basic reasoning and add only a few thoughts addressed to the majority opinion.

Since the district court's power to enjoin is assumed, the issue is one of discretion. The majority largely ignores the basic reason given by the district judge for his exercise of that discretion—that otherwise the criminal trial of these defendants will be fundamentally unfair. If the trial court by order allowed the Government full discovery in the criminal case and denied it to defendants, all would agree that this would be basically unfair. Yet that is what may well happen because of this reversal. The absence of [fol. 591] collusion between the trustee in the civil suit and the Government in the criminal suit is not controlling; the effect of the discovery on defendants in the criminal case is. The majority can see no distinction between use of depositions taken before and after the criminal indictment. To

me the distinction is clear. Once the indictment was filed, the court in which those charges were to be tried had the duty to keep the criminal proceedings fair. In the absence of such proceedings, there was, of course, no correlative duty.

In addition, even if I had doubts about the correctness of the trial court's action—and I do not—the reversal is totally uncalled for. The injunction by its terms expires in about two weeks. I see no adequate reason why the conflicting interests cannot be again left to the discretion of the district judge on March 17. At that time, he will be able to appraise the situation again in the light of circumstances then existing. For example, he can consider whether the criminal trial is being unduly delayed by defendants Simon, Kaiser and Fisher, whether they will adhere to the assurance given on oral argument of preparing for a trial date in May, whether a Rule 2 judge has been appointed to expedite that trial, whether it is now true (as apparently it was not on the record before Judge Bryan) that the trustee has no other meaningful depositions to take, and whether, if there is going to be significant delay, it might be practical to allow depositions with appropriate prohibitions on use of them by the Government.

In other words, I think the district judge was right, and, in any event, would allow him to exercise his discretion again on March 17 when the injunction expires. Cf. *Nederlandse Erts-Tankersmaatschappij, N. V.* v. *Isbrandtsen Co.*, 362 F. 2d 205 (2d Cir. 1966).

[fol. 592]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present:

Hon. J. Edward Lumbard, Chief Judge, Hon. J. Joseph Smith, Hon. Wilfred Feinberg, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff,

v.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN, Defendants-Appellees,

HAROLD ROTH, Defendant,

IRVING L. WHARTON, Appellant.

JUDGMENT—March 3, 1967

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

[fol. 593] [File endorsement omitted]

[fol. 594]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 831

#33332

UNITED STATES OF AMERICA,

—against—

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN, Defendants.

MEMORANDUM OPINION AND ORDER—March 17, 1967

BRYAN, District Judge:

On December 16, 1966 an order was entered in this criminal action enjoining Irving L. Wharton, as Trustee in Reorganization of Continental Vending Machine Corporation and Continental Apco, Inc. in a Chapter X proceeding in the United States District Court for the Eastern District of New York (the Trustee), his attorneys and agents from continuing the depositions of defendants Simon and Kaiser and from taking the deposition of defendant Fishman in two civil actions in the Eastern District entitled Wharton v. Lybrand, et al., 65 Civil 664, and Wharton v. Roth, et al., 64 Civil 946, until and including March 17, 1967. The order further provided that at the conclusion of that period the moving defendants might apply for further relief with respect to those depositions on good cause shown.

[fol. 595] On appeal by the Trustee, the Court of Appeals for the Second Circuit, in an opinion dated March 3, 1967, reversed the injunction order of December 16, 1966, with a

[File endorsement omitted]

dissenting opinion by Judge Feinberg, and directed that "The mandate shall go down forthwith."

Thereafter the moving defendants applied to Mr. Justice Harlan for a stay of the mandate of the Court of Appeals and for a continuance of the order which had been reversed beyond its expiration date of March 17, 1967, pending an application to the Supreme Court for a writ of certiorari and if such writ were granted, until the issuance of the judgment of the Supreme Court. On March 13, 1967 Mr. Justice Harlan in a memorandum opinion made the following disposition of that application:

> "Having considered the papers on both sides, I cannot regard the issues sought to be reviewed as insubstantial. I am of the opinion, however, that continuance of the District Court's injunction order, presently expiring by its own terms on March 16, 1967 [footnote omitted], is best left to that court.
>
> "Accordingly, I dispose of this application as follows. I deny the application for a continuance of the District Court's injunction order pending certiorari, without prejudice to the petitioners promptly applying to the District Court for a continuance. I stay the execution and enforcement of the judgment entered pursuant to the mandate of the Court of Appeals pending this court's disposition of and determination upon the petition for certiorari, on condition however that such petition is filed on or before March 23, 1967."

[fol. 596] Mr. Justice Harlan entered an order staying the execution and enforcement of the judgment of reversal entered in this court pursuant to the mandate of the Court of Appeals pending the action of the Supreme Court on a petition for certiorari to be filed by March 23, 1967. The order further provided that if the petition for certiorari is denied the stay terminates automatically but that if certiorari is granted the stay remains in effect pending the issuance of the judgment of the Supreme Court.

In this posture of the case defendants Simon, Kaiser and Fishman move before me for a continuance of the injunction order expiring on March 17, 1967, during the pendency of their petition to the Supreme Court for a writ of certiorari and thereafter, in the event that such petition is granted, pending the issuance of judgment in the Supreme Court. Mr. Justice Harlan expressly left the issue of whether the injunction should be continued to the District Court.

The first question is what standards and principles should be applied in determining that issue. The Trustee's position on that question is as follows:

> "We stand fully on the opinion of the Court of Appeals which reversed your Order of December 16, 1966 and maintain that this opinion expresses the law in this district binding upon you until reversed by some higher court. Accordingly, any decision by you in this application inconsistent with that opinion, we believe to be inappropriate."

[fol. 597] The moving defendants, on the other hand, contend that the standards and principles set forth in my opinion of December 12, 1966 (262 F. Supp. 64), granting the injunction order must govern.

It does not seem to me that the position taken by the Trustee can be correct. Were the standards and principles of the opinion of reversal of the Court of Appeals applied, the present application would have to be denied out of hand. The "not insubstantial" questions which the defendants seek to have reviewed by the Supreme Court by petition for writ of certiorari would become moot. The leave given to the defendants by Mr. Justice Harlan to file their petition in the Supreme Court by March 23, 1967 would be an empty gesture since there would be no questions remaining for determination by the Supreme Court. Mr. Justice Harlan's stay of the execution and enforcement of the judgment of the District Court entered on the mandate of the Court of Appeals would be meaningless.

Thus, in determining the present application I must necessarily follow the principles and standards enunciated in my prior opinion.

The moving defendants, while conceding that the factual situation which prevailed last December when the injunction order was issued has changed somewhat, urge that the basic considerations on which that order was based still [fol. 598] prevail. These considerations are fully discussed in my opinion and need not be repeated here. Defendants urge further that the injunction should be continued to permit them to present to the Supreme Court the questions which they seek to raise there and point out that otherwise the substantial rights which they seek to protect will be irretrievably lost.

The Trustee opposes the continuation of the injunction in any respect even under the standards and principles of the prior opinion of this court. He takes the position that the factual situation on which the injunction was granted last December has since so materially changed that the necessity for injunctive relief to protect the defendants' rights to a fair trial no longer exists. He urges further that in any event the equities in favor of the Trustee now so far outbalance the equities in favor of the criminal defendants as to require that the injunction order be dissolved.

It is true that the original expectation of the defendants that the criminal case would be tried in April or May of this year has proven overly optimistic. However, both sides agree that the criminal case is difficult and complex and it is not disputed that both the defendants and the prosecution have proceeded with due diligence. It now appears likely that the criminal case will be ready for trial immediately after the summer.

The civil cases in the Eastern District of New York are [fol. 599] by no means ready for trial either. The Trustee says that substantially all of the numerous depositions which he must take have been completed, with the exception of those of Simon, Kaiser and Fishman. This did not ap-

pear to be so last December. The Trustee estimates that if he is now permitted to take these depositions, which he says will take some five weeks, the principal civil case in the Eastern District will be ready for trial in August.

Yet no depositions at all have been taken by the defendants in that action and their discovery has not commenced. The Trustee apparently insists that the order of priority must be maintained and that no discovery by defendants can commence until his has been completed. Without necessarily accepting the estimate of counsel for those defendants that at least six months will be required to take the necessary depositions on their behalf and to complete discovery, it is plain that a substantial amount of testimony by deposition will have to be taken on defendants' behalf. Under these circumstances it appears unlikely that the civil action would be ready for trial appreciably before the criminal action, and it is possible that the two may be on a collision course. In such event the Trustee concedes that the trial of the criminal case should take place first.

The Trustee also contends that information already disclosed to the Government through the testimony of the [fol. 600] criminal defendants before the Grand Jury and by memorandum of their counsel makes the protections afforded to the defendants by the injunctive order no longer necessary. But I am not persuaded that such material as has been already disclosed makes the immediate taking of the proposed depositions by the Trustee any less a threat to the fundamental fairness of the criminal trial than it was on the original application.

Acceptable alternative solutions to the problem by way of modification of the injunction order as it now stands—for example, as suggested in Judge Feinberg's dissenting opinion, "to allow depositions with appropriate prohibitions on use of them by the Government"—not only present major practical difficulties which all the parties recognize but, as I view it, would not be permissible under the majority opinion of the Court of Appeals which will go into full force and effect if the petition for writ of certiorari is

denied. Whatever rights the criminal defendants were deemed to have under the decision of this court granting injunctive relief which they seek to have reinstated by the Supreme Court would therefore be lost.

On the other hand, if the Supreme Court should grant certiorari, the "not insubstantial" questions raised, which, as the Court of Appeals pointed out, are of first instance, will be finally resolved. Any steps necessary to afford pro-
[fol. 601] tection to the rights of the competing interests before the court can then be taken.

It seems likely that the defendants' petition for writ of certiorari will be determined in a very few weeks. If the writ is granted no doubt the Supreme Court will give full consideration to an application for early argument and disposition of the case.

Taking all the facts and circumstances into account, I conclude that there is reasonable probability that if the injunction order expiring on March 17, 1967 is not continued in effect for at least a limited period such unfairness in the criminal trial is likely to result as to require the continued intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it.

In my view the prejudice to the defendants were the injunction order not so continued substantially outbalances any prejudice to the Trustee and the interests he represents.

Therefore, in the exercise of my discretion I grant the application of the defendants to the extent that the provisions of the injunction order of December 16, 1966, will continue pending the determination by the Supreme Court of a petition for writ of certiorari to be filed by the defendants not later than March 23, 1967. If the petition is denied
[fol. 602] the injunction order will thereupon be dissolved pursuant to the mandate of the Court of Appeals. If the petition is granted the provisions of the injunction order will continue in force and effect until the issuance of the judgment of the Supreme Court.

It is so ordered.

The foregoing memorandum constitutes my findings of fact and conclusions of law on this application.

Frederick vP. Bryan, United States District Judge.

Dated: New York, N. Y., March 17, 1967.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 603]

SUPREME COURT OF THE UNITED STATES

No. 1185—October Term, 1966

CARL SIMON, *et al.*, Petitioners,

v.

IRVING L. WHARTON, etc.

ORDER ALLOWING CERTIORARI—May 8, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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MAR 23 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1185~~ 72

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Petitioners,

v.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARVIN SCHWARTZ,
THOMAS E. PATTON,
SULLIVAN & CROMWELL,
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48 Wall Street,
New York, New York 10005.

March 23, 1967

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Tumey v. *Ohio*, 273 U. S. 510 (1927)	15
United States v. *A.B. Rick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947)	10
United States v. *Bridges*, 86 F. Supp. 931 (N.D. Cal. 1949)	10
United States v. *Linen Supply Institute*, 18 F.R.D. 452 (S.D.N.Y. 1955)	10
United States v. *Maine Lobstermen's Ass'n.*, 22 F.R.D. 199 (D. Me. 1958)	10
United States v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965)	10
United States v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964)	10
United States v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964)	10
Zara Contracting Co. v. *New York*, 22 App. Div. 2d 413, 256 N.Y.S. 2d 98 (3d Dep't 1965)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Petitioners,

v.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 3, 1967.

Citation to Opinions Below

The opinion of the District Court granting an injunction to petitioners (120a)* is printed in Appendix C hereto and

* The appendix method of appeal was used in the Court of Appeals and pursuant to Rule 21(3) of this Court the appendices of the parties were filed in this Court. References to Respondent's Appendix (Appellant below) are designated by "a". References to Petitioner's Appendix are designated by "b". References to additional portions of the Record and to the proceedings in the Court of Appeals filed with this Court are preceded by "R."

is reported at 262 F. Supp. 64. The majority and dissenting opinions in the Court of Appeals, which reversed the judgment of the District Court, are printed in Appendix A hereto and are not yet reported.

Jurisdiction

The judgment of the Court of Appeals, printed in Appendix B hereto, was entered March 3, 1967. The mandate of the Court of Appeals was stayed pending proceedings in this Court by order of Mr. Justice Harlan dated March 13, 1967 following the Court of Appeals' denial of a stay on March 9, 1967. The 90-day injunction of the District Court, which expired on March 17, 1967, was continued, by an opinion and order of that Court dated March 17, 1967, until final disposition of this matter by this Court (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Question Presented

This petition presents the question whether a federal criminal court may act to insure a fair criminal trial by enjoining the depositions of the defendants in the criminal case in related private civil litigation pending in another federal district.

The District Court (Judge Frederick vP. Bryan) issued such an injunction here in the following circumstances: Both the indictment in the Southern District of New York and the complaint in the civil action pending in the Eastern District of New York charged fraud with respect to a number of the same transactions. The subject matter of the indictment and of the civil complaint are, in the main, the same. The Assistant United States Attorney in charge

of the criminal case relied extensively in the presentation of the case to the Grand Jury upon materials yielded by discovery proceedings in the civil case, he has been in personal contact with the attorneys for respondent (the plaintiff in the civil case) and deposition transcripts from the civil case have been made available to him. If the depositions were taken, the prosecution would have available to it in advance of trial the whole of the defense case, a significant advantage which it could not otherwise obtain.

The District Court in the criminal case enjoined the civil depositions upon the findings that petitioners

> "• • • will suffer substantial and irreparable prejudice in their defense of the criminal charges against them if the [respondent] Trustee continues to take their depositions at this time and that it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings." (C22)

To the District Court, "the controlling consideration" was

> "• • • the protection of the paramount public interest in assuring the essential fairness of criminal proceedings under the Rules of Procedure laid down for their conduct." (C16)

The District Court concluded that

> "The practical effect of denying injunctive relief against the taking of the depositions of the three criminal defendants at this time is likely to permit the prosecution to have full disclosure in contravention of the protections given defendants by the Rules of Civil Procedure." (C15)

The District Court concluded further that in balancing the probable prejudice to petitioners in their defense of

the criminal case against reasonable and judicially controlled delay in the taking of three depositions in a protracted civil case, the "scales are tipped overwhelmingly" in petitioners' favor.

On appeal to the Court of Appeals for the Second Circuit, the injunction was reversed, with Circuit Judge Feinberg dissenting. The Court of Appeals majority (Chief Judge Lumbard and Circuit Judge Smith) held that issuance of the injunction was error because any imbalance of pre-trial disclosure in the criminal case was "merely the natural by-product of another judicial proceeding" (A7). Such an injunction could issue, the Court of Appeals held, only upon a showing that the civil case depositions "would interfere with the trial of the indictment or the preparation of their [petitioners'] defense in that trial" (A3); petitioners' only remedy against unfair imbalance in pre-trial disclosure was to refuse to testify in the civil case on self-incrimination grounds. To the Court of Appeals majority, the controlling consideration appeared to be "the public interest in the progress of the Eastern District [civil] action" (A7).

In dissent, Circuit Judge Feinberg wrote that he would have affirmed on the basis of Judge Bryan's opinion, that without an injunction, "the criminal trial of these defendants will be fundamentally unfair" and that "the reversal is totally uncalled for" because its continuance should have been left to the discretion of the District Court (A11).

Constitutional Provisions, Statutes and Rules Involved

The constitutional provision involved is the due process clause of the fifth amendment to the United States Con-

stitution. The statute giving the District Court power to issue the injunction is 28 U.S.S. §1651(a). The rules giving the District Court discretion to enter the injunction are Rules 2 and 57(b) of the Federal Rules of Criminal Procedure. These provisions are printed in Appendix E, *infra*.

Statement

Petitioners Simon and Kaiser are partners and petitioner Fishman is a senior professional associate of the national independent accounting firm of Lybrand, Ross Bros. & Montgomery ("Lybrand"). All three have been indicted in the United States District Court for the Southern District of New York upon charges of conspiracy to file false financial statements with the Securities and Exchange Commission and of mail fraud in connection with the financial statements of Continental Vending Machine Corp. ("Continental"), a client of the Lybrand firm. The Lybrand firm is not indicted but is named as a co-conspirator (75a). The indictment was filed October 17, 1966, and the defendants have pleaded not guilty.

A. The civil action in the Eastern District of New York.

Fifteen months before the indictment, Continental's Chapter X trustee, Respondent Wharton, brought a civil action against the Lybrand firm in the United States District Court for the Eastern District of New York, claiming damages for alleged fraud and conspiracy in connection with the same Continental financial statements alleged in the indictment as well as in connection with

earlier ones. Petitioners are not named as defendants in the civil action.

In September 1965, the trustee began taking the oral deposition of petitioner Simon as a witness. Although Simon testified for 16 days and the transcript runs to 1,800 pages, his direct examination has not been completed (122a). Before the indictment, the trustee also took the deposition of several other Lybrand partners and associates (108a-110a, 3b-6b).

B. The Kaiser deposition.

In October 1966, just a few days before the indictment, counsel for Lybrand and counsel for respondent agreed that the deposition of petitioner Kaiser would commence on October 20 (108a-110, 3b). When the indictment was filed on October 17, counsel for Lybrand and Kaiser's personal counsel sought unsuccessfully an adjournment of the deposition so that the situation could be reconsidered, and in particular so that Kaiser could retain and consult with counsel for the criminal case.

Unable to arrange an adjournment, Kaiser's counsel was compelled to move on October 21 in the civil case for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure to prevent the deposition upon the ground that Kaiser's appearance at a deposition at that time would violate his right against self-incrimination and would be oppressive (1a). Kaiser was the sole moving party. The motion was denied by Judge Jacob Mishler* of the

* The Chapter X proceedings involving Continental and a subsidiary corporation have been assigned to Judge Jacob Mishler for all purposes under Rule 2 of the General Rules of the Eastern District. Similarly, the civil suit brought by the Chapter X trustee against Lybrand has been assigned to Judge Mishler for all purposes.

Eastern District on the ground that Kaiser was required to appear and assert his privilege against self-incrimination if he chose not to testify (45a). Kaiser appealed to the Court of Appeals, but the appeal was dismissed summarily without opinion on October 26, 1966, presumably because the order was not appealable (59a). Kaiser was ordered to appear for his deposition on October 26 and on that date Kaiser and his counsel moved before Judge Mishler for a week's adjournment of the deposition so that Kaiser could retain trial counsel for the criminal case and consult with him with respect to the deposition. The motion was denied from the bench and the deposition began (R4-R17). On October 31 Kaiser again testified and further deposition dates were fixed for November 2 and 4.

C. The motion for an injunction in the Southern District of New York.

On October 27, petitioner Kaiser, together with petitioners Simon and Fishman, retained counsel for the criminal case, who moved on November 1 in the Criminal Motion Part in the Southern District of New York on behalf of all three defendants for an injunction against respondent to prevent him from continuing the civil case against Lybrand until the completion of the criminal case on the grounds that the continued depositions would provide discovery to the Government not otherwise available to it and that the depositions would be burdensome (90a). On December 12, 1966, Judge Bryan granted the motion in part, holding that the taking of petitioners' depositions should be enjoined for 90 days, after which the injunction could be continued upon application by petitioners for good cause shown. The injunction was entered December 16, 1966; it expired by its own terms on March 17, 1967 (145a).

D. The decision of the Court of Appeals and continuance of the injunction by the District Court.

The Court of Appeals reversed the injunction on March 3, 1967, with Circuit Judge Feinberg dissenting (Appendix A). The judgment of the Court of Appeals directed that its mandate issue forthwith.

After moving unsuccessfully in the Court of Appeals for stay of the mandate, petitioners applied to Mr. Justice Harlan for stay of the mandate and for continuance by this Court of the District Court injunction pending review in this Court. Mr. Justice Harlan, by order and memorandum opinion of March 13, 1967, stayed the Court of Appeals mandate but denied, without prejudice to prompt application in the District Court, petitioners' motion for continuance of the injunction. Thereafter, petitioners moved in the District Court for continuance of the injunction and that motion was granted on March 17, 1967 (Appendix D). The District Court found that the civil case was "by no means ready for trial" (D5) and concluded that

> "• • • if the injunction order expiring on March 17, 1967 is not continued in effect for at least a limited period such unfairness in the criminal trial is likely to result as to require the continued intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it." (D7)

Accordingly, the injunction remains in effect pending review in this Court.

E. The relevant facts.

The indictment and the civil complaint both concern the financial statements of Continental, a publicly-held company whose securities were listed on the American

Stock Exchange. Continental was a client of the Lybrand firm and the defendants' connection with the allegedly false financial statements was as independent public accountants. The function with respect to which they stand accused was to examine, in accordance with generally accepted auditing standards, and to express an opinion upon the financial statements of their client.

The facts which are relevant at this stage of the proceedings are few and undisputed:

(1) The transactions on which the civil claims are stated form the basis of the criminal charges (45a, 128a, compare 75a with R267).

(2) The deposition testimony so far given by petitioners Simon and Kaiser related to the matters alleged in the indictment. Both were questioned and both testified with respect to factual matters as well as to their views of prevailing auditing standards and accounting principles (7b, 10b, R1-247).

(3) The prosecution has continuously received from respondent's attorneys deposition transcripts and documents produced in the civil action (117a, 130a, 9b-10b). The prosecution asserts its right to continue to do so (116a-118a).

(4) If the depositions continue, the prosecution may discover in advance of trial the whole defense case—an advantage which the prosecution itself could not obtain directly under the Federal Rules of Criminal Procedure.

(5) If the depositions continue, the prosecution would gain a substantial advantage over the defendants.

(6) The District Court found, both before and after decision in the Court of Appeals, that any inconvenience and delay to respondent was overwhelmingly outweighed by the probability of substantial prejudice to petitioners if the depositions continued.

Reasons For Granting The Writ

This petition presents a substantial and important question concerning the administration of criminal justice in the federal courts. That question arises out of the strikingly different policies underlying pre-trial disclosure in civil and criminal cases. This case poses the question whether and how those different policies should be adjusted or harmonized when they collide in concurrent civil and criminal litigation. In this Court, the question is one of first impression.

I

The district courts deal frequently with questions concerning the control of discovery in concurrent civil and criminal litigation in order to avoid prejudice either to the prosecution or to the defense in the criminal case. The reported decisions in the district courts hold that civil discovery should not ordinarily go forward against the prosecution or against a defendant in a criminal case when both cases involve the same issues.*

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* *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), *cert. denied*, 371 U. S. 955 (1963); *United States* v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964); *United States* v. *Maine Lobstermen's Ass'n*, 22 F.R.D. 199 (D. Me. 1958); *United States* v. *Linen Supply Institute of Greater New York*, 18 F.R.D. 452 (S.D.N.Y. 1955); *United States* v. *Bridges*, 86 F. Supp. 931 (N.D. Cal. 1949); *United States* v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947); *Zara Contracting Co.* v. *New York*, 22 App. Div. 2d 415, 256 N.Y.S. 2d 98 (3rd Dep't 1965); *Perry* v. *McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964); *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp.* v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952); *Cf. United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965); but see *Hiss* v. *Chambers*, 8 F.R.D. 480 (D. Md. 1948)

The opinion of the Court of Appeals majority in the present case is the first to suggest that while the Government may invoke the authority of the trial court to avoid disclosure of its case when it brings concurrent civil and criminal suits, a person accused of crime must yield discovery of his entire case to the prosecution except to the extent that he invokes his fifth amendment privilege against self-incrimination.

Fundamental as may be the fifth amendment's provision that no man shall be compelled to give testimony against himself, it is not the office of that historic provision to adjust and harmonize the different policies underlying pre-trial disclosure in civil and criminal litigation. The fifth amendment is not the full measure of a man's right to a criminal trial which is fundamentally fair and it hardly comports with civilized standards of fairness to say that since pre-trial disclosure to the prosecution of the entire defense case is a "natural by-product of another judicial proceeding" (A8), a defendant's only remedy is his right against self-incrimination.

The remedy proffered by the Court of Appeals majority is not in the circumstances of this case any remedy at all, for petitioners would lose almost as much by refusal to testify on self-incrimination grounds as by conviction in the criminal case. We recognize that in law no stigma attaches to assertion of fifth amendment rights. Perhaps in the perfect society there would be no stigma of any kind. But we know as a matter of common sense that professional men associated with a distinguished firm of independent public accountants would end their careers by refusal to testify in order to avoid self-incrimination.

Moreover, the Court of Appeals majority indicated complete misapprehension of the nature of a witness' fifth amendment rights when it suggested that peti-

tioners could predicate refusal to testify in the civil case "on advice of counsel in order to prevent pretrial disclosure of their factual contentions" (A8). The avoidance of pretrial disclosure is not a legitimate fifth amendment ground for refusal to testify. The fifth amendment is concerned not with pretrial disclosure, but only with testimony which may tend to incriminate. *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951); *United States* v. *Costello,* 222 F. 2d 656, 661 (2d Cir.), *cert. denied,* 350 U. S. 847 (1955).

The emphasis of the Court of Appeals majority upon the right against self-incrimination creates a dubious standard for the district courts. Since that standard relates to the fair administration of criminal justice and to questions which frequently arise in concurrent civil and criminal litigation, it is appropriate for this Court to enunciate the principles which are to govern for the future.

II

Only one other Court of Appeals has dealt with the question of controlling discovery in concurrent civil and criminal litigation. In *Campbell* v. *Eastland,* 307 F. 2d 478 (5th Cir. 1962), *cert. denied,* 371 U. S. 955 (1963), the Fifth Circuit stated the controlling considerations:

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restric-

> tive * * *. Separate policies and objectives support these different rules.
>
> "* * * Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. * * *"

While the Fifth Circuit did not have before it an injunction issued by the District Court, its view of the governing principles cannot be reconciled with the reasoning of the Court of Appeals. The Second Circuit stated here that "we decline to follow" the consistent line of cases which reflect the *Campbell* holding, and held instead that a defendant's remedy was to assert his fifth amendment privilege (A10).

III

The Court of Appeals said that because injunctions such as the one issued here "are fraught with possibilities of conflict between courts" (A9), it would be more appropriate to repose control of discovery in that court in which the civil case is pending. But where the interest involved is the right of an accused to a fair criminal trial, the federal courts have never shirked an appropriate remedy because it was "fraught with possibilities of conflict between courts".

Moreover, it is the court in which the criminal case is pending which bears the responsibility of affording a fair criminal trial. In the civil action, a defendant's remedy would be limited to a motion for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure. Petitioner Kaiser, the only one of the three petitioners whose deposition was scheduled subsequent to indictment, made such a motion in the civil case here, but upon denial of that motion his appeal to the Court of Appeals was dis-

missed. Since the decision on a motion made under Rule 30(b) of the Civil Rules is not appealable, the Court of Appeals majority would leave to resolution by unappealable order important questions relating to the fair administration of criminal justice. In any event, the appropriateness of a motion for a protective order in the civil case should not preclude an injunction by the criminal court when necessary to ensure a fair criminal trial.

The circumstance that district court decisions involving control of discovery in concurrent civil and criminal litigation are nearly always rendered in a form which is not appealable underscores the appropriateness of granting certiorari here—where the question is presented by appealable order—in order to give guidance in an area of significant concern.

IV

Due process requires fundamental fairness, *In re Murchison*, 349 U. S. 133 (1955), and this Court has charged the district courts to preserve the fair application of the Criminal Rules. *McNabb* v. *United States*, 318 U. S. 332 (1943). This Court recently held in *Estes* v. *Texas*, 381 U. S. 532 (1965), that where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find identifiable prejudice in order to conclude that due process is wanting.

The District Court here canvassed all of the relevant considerations, weighed the prejudice to respondent by some delay in the taking of three depositions in a civil case against the probability of substantial prejudice to petitioners in the criminal case, concluded that the scales weighed overwhelmingly in petitioners' favor and issued an injunction because,

> "Having found that it is reasonably probable that if these depositions are taken now essential unfair-

> ness will result which will threaten the integrity of the criminal proceedings, this court may not shirk its duty to protect the criminal process before it from that probability."

The District Court thus bottomed its injunction upon the kind of fundamental unfairness envisioned by Chief Justice Taft in *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Judge Bryan's decision is unassailable in its logic, enlightened and yet coldly practical in its approach to the fair administration of criminal justice. We submit that the standards he applied are those which should govern generally in the federal courts in cases of concurrent civil and criminal litigation. Since those standards were repudiated by the Court of Appeals in one of the only two appellate decisions which deal with the question, we submit that this Court should in the exercise of its supervisory powers over the federal district courts grant certiorari to settle an important question in the administration of criminal justice.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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48 Wall Street,
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March 23, 1967

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 337—September Term, 1966

Argued February 7, 1967 Decided March 3, 1967

Docket No. 31012

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Defendants-Appellees,

and

HAROLD ROTH,

Defendant.

IRVING L. WHARTON,

Appellant.

Before Lumbard, Chief Judge, Smith and Feinberg, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Frederick van Pelt Bryan, J. 262 F. Supp. 64, enjoining the plaintiff in an action pending in the Eastern District of New York for a period of ninety days from taking the deposi-

tions of three defendants named in an indictment pending in the Southern District of New York.

Reversed.

Marvin Schwartz, New York, N. Y., (Thomas E. Patton, Sullivan & Cromwell, New York, N. Y., on the brief) for defendants-appellees.

Joseph J. Marcheso, New York, N. Y., (Robert Giordano, Christy, Bauman, Frey & Christy, New York, N. Y., on the brief) for appellant.

Lumbard, Chief Judge.

The question on this appeal is whether there is sufficient basis for an order entered by Judge Bryan in the Southern District of New York on December 16, 1966, enjoining Irving L. Wharton, trustee in the bankruptcy receivership of Continental Vending Machine Corporation in the Eastern District of New York, for a period of ninety days from taking the depositions in an action pending in the Eastern District since July 1965 of the three defendant-appellees, who are named in an indictment filed in the Southern District on October 17, 1966, which involves in part the same facts as the Eastern District action.

Judge Mishler, the Rule 2 judge in the Eastern District action,[1] had on October 24, 1966 denied an application

1. General Rule 2(b) of the Eastern District provides in part: "The chief judge with the approval of his associate judges, upon his own motion or the motion of any party, may assign a long and complicated case to a judge for all purposes including the following: (1) to hear all motions and preliminary applications; (2) to conduct the pre-trial conference; and (3) to preside at the trial of the action."

made by the defendant-appellee Kaiser after the indictment was filed for a protective order under Fed. R. Civ. P. 30(b), staying his deposition on the ground that it was oppressive and violated his Fifth Amendment privilege against self-incrimination. Judge Mishler observed that Kaiser could assert his privilege in response to specific questions at the deposition. None of the appellees has invoked the privilege against self-incrimination at any point.

Although the indictment was returned in October 1966, no date has been set for the criminal trial in the Southern District. As appellees have made no showing that the taking of the depositions would interfere with the trial of the indictment or with the preparation of their defense in that trial, we reverse Judge Bryan's order.

It is conceded that the trustee is diligently pressing forward the preparation of the Eastern District action for trial, that he is seeking in good faith to take appellees' depositions for purposes of that action, and that the depositions are essential to his preparation for trial. An involuntary petition for the reorganization of Continental Vending Machine Corporation under Chapter X of the Bankruptcy Act was granted by Judge Mishler in July 1963, and Irving L. Wharton was appointed and qualified as trustee.[2] On July 1, 1965, the trustee commenced a civil action in the Eastern District against the accounting firm of Lybrand, Ross Bros. & Montgomery, Harold Roth,

2. John P. Campbell, who had been appointed conservator of Continental's assets on complaint of the Securities and Exchange Commission by Judge Bonsal in the Southern District in April 1963, was appointed co-trustee with Wharton. Since Campbell's resignation in September 1964, Wharton has acted as sole trustee.

the former president of Continental, and the Meadowbrook National Bank, seeking damages for an alleged conspiracy to despoil Continental's assets and to conceal the despoliation by means including the certification of false financial statements by Lybrand for the audit years 1958 through 1962, and for alleged negligence and recklessness of Lybrand and others in permitting the alleged despoliation. This action was consolidated with one brought in September 1964 against Roth, various officers and directors of Continental, and others (but not against Lybrand, pending settlement talks which later failed), and the consolidated actions were assigned to Judge Mishler as the Rule 2 Judge for all purposes.

The trustee has expended substantial sums for legal and accounting fees in the discovery proceedings against Lybrand, which began shortly after July 1965. All Lybrand's books and records relating to the audit years in question have been made available to the trustee, and Lybrand personnel have been deposed, including the appellee Simon, the Lybrand partner in charge of the Continental engagement from 1960 to 1963, whose deposition is still open. The deposition of the appellee Kaiser, another Lybrand partner connected with the Continental engagement, had been scheduled to begin October 20, 1966 when the Southern District indictment was returned on October 17, 1966.

The indictment charged Roth and the appellee Simon, Kaiser, and Fishman in six counts with mail fraud, 62 Stat. 763 (1948), as amended, 18 U.S.C. § 1341, and conspiracy to commit mail fraud and to file a willfully false and misleading report with the Securities and Exchange Com-

mission in violation of 48 Stat. 904 (1934), as amended, 15 U.S.C. § 78ff, 62 Stat. 749 (1948), 18 U.S.C. § 1001, by certifying, mailing, and filing a materially false and misleading balance sheet for Continental for the audit year 1962. All of the statements in Continental's 1962 balance sheet alleged by the indictment to be false and misleading would seem to be material to the trustee's actions, and at least two are specifically alleged in the trustee's July 1965 complaint.

After Judge Mishler had denied the appellee Kaiser's application for a protective order staying his deposition on October 24, 1966, Kaiser was deposed at two sessions on October 26 and 31, 1966. The appellees then moved before Judge Bryan on November 1, 1966 for an order enjoining the trustee from taking their depositions prior to the Southern District criminal trial. At the hearing of this motion on November 4, 1966, Judge Bryan issued a temporary restraining order pending its determination. On December 5, 1966, without application by the trustee, Judge Mishler directed Kaiser to appear for a continued deposition. This Court on December 8, 1966 stayed Judge Mishler's order until December 12, 1966, and after Judge Bryan's decision on December 12 further stayed Judge Mishler's order pending the expedited hearing and determination of any appeal from Judge Bryan's order of December 16, which appeal was later perfected and is now before us.

Judge Bryan held that he had the power to enjoin the trustee from taking the appellees' depositions both under the All Writs Act, 62 Stat. 944 (1948), as amended, 28 U.S.C. § 1651(a), and in exercise of the court's super-

visory power over the administration of federal criminal justice. See, e.g., McNabb *v.* United States, 318 U. S. 332, 340-41 (1943). He concluded that this power should be exercised because "it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings" if the prosecution is permitted to use appellees' deposition testimony when it could not under the Federal Rules of Criminal Procedure obtain criminal discovery against them, 262 F. Supp. 64 (S.D.N.Y. 1966).

Both holdings present questions of first impression. No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, either under the All Writs Act, compare Steelman *v.* All Continent Corp., 301 U. S. 278 (1937) (injunction restraining action against trustee in bankruptcy), or under the supervisory power, which the Supreme Court has implemented by formulating rules for the conduct of criminal trials, e.g., Cheff *v.* Schnackenberg, 384 U. S. 373 (1966); McNabb *v.* United States, supra, or by enjoining the commission of acts by "federal law enforcement agencies." Rea *v.* United States, 350 U. S. 214, 217 (1956). We assume without deciding that the lower court had power to issue such an injunction, but we hold that it should not have done so, as there is no showing that the depositions sought by the trustee would interfere with the trial of the indictment or the appellees' preparation of their defense.

This appeal requires us to balance appellees' desire to prevent pretrial disclosure of their factual contentions to the prosecution in the Southern District criminal proceed-

ing, without asserting their fifth amendment privileges against self-incrimination, against the interest of the trustee, representing numerous creditors and public security holders of Continental, in the expeditious progress of the Eastern District action. The trustee requires the appellees' deposition testimony to complete his preparation for the trial of the Eastern District action, which must be received before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed. It is conceded that the trustee seeks in good faith to depose appellees for purposes of the Eastern District action, and that there has been no consultation on lines of questioning between the trustee and the United States Attorney for the Southern District.

Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privileges against self-incrimination. It could hardly be contended, and appellees do not contend, that the prosecution in the Southern District could be enjoined from using the deposition testimony given by the appellee Simon before the Southern District indictment was returned. As long as appellees' preparation for the Southern District criminal trial is not hampered, we see no valid distinction in the fact that appellees' remaining depositions could not be scheduled until after the indictment was returned. In both cases, if appellees choose not to assert their privileges against self-incrimination, we see no reason why their testimony should be withheld from the trustee. The fact that additional testimony thereby becomes available to the government is merely the natural byproduct of another

judicial proceeding; and to that extent it might be "discovery", but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees. Indeed the constitutional rights of the appellees are unimpaired; here they are in suspension because the appellees have not chosen to avail themselves of their Fifth Amendment privileges.

It is true that appellees have testified in the trustee's depositions and before the grand jury that indicted them without asserting their privileges against self-incrimination. Since, however, "it is well established that a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding," United States *v.* Miranti, 253 F. 2d 135, 139 (2 Cir. 1958); see 8 Wigmore, Evidence §2276, at 470-72 (McNaughton rev. 1961), the appellees Kaiser and Fishman certainly, and Simon probably, could have interposed the privilege when the trustee sought to depose them after the indictment was returned.

Appellees urge that, as accountants, they "would lose their professional lives" by invoking the privilege. We are not sure that they would, if it were made clear that the privilege was claimed only on advice of counsel in order to prevent pretrial disclosure of their factual contentions. Whether or not they would, however, the same dilemma is faced by any witness in a civil or criminal trial who is himself under investigation or indictment for other crimes. Such a witness must either invoke his privilege against self-incrimination, or assume "the general duty to give what testimony one is capable of giving." See 8 Wigmore, Evidence §2192 (McNaughton rev. 1961).

It is for the same reason that a witness who has been given immunity from prosecution must testify although his testimony may expose him to such extralegal pressures as "loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium." Ullmann *v.* United States, 350 U. S. 422, 430 (1955); see Piemonte *v.* United States, 367 U. S. 556 (1961). We cannot agree that "civilized standards of procedure and evidence," McNabb *v.* United States, supra at 340, require that a witness under indictment be given the option of non-appearance in any proceedings in related civil or criminal cases until his own trial is concluded.

We are also led to reverse Judge Bryan's order by the consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here.

Judge Bryan relied heavily upon two lines of cases in which "it has been consistently held that where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a

stay of discovery in the civil action until disposition of the criminal matter * * * whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence," citing, for example, Campbell *v.* Eastland, 307 F. 2d 478 (5 Cir. 1962), cert. denied, 371 U. S. 955 (1963), "or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution," citing Perry *v.* McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964), Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil Co., Inc., 14 F.R.D. 333 (E.D. Pa. 1953), and National Discount Corp. *v.* Holzbaugh, 13 F.R.D. 236 (E.D. Mich. 1952). 262 F. Supp. at 74.

Both lines of cases seem to us to be inapposite. Cases where the criminal defendant seeks disclosure of the government's evidence, or the government seeks disclosure of the defendant's, are distinguishable because here the trustee, who seeks to depose appellees, is pursuing an independent action on behalf of Continental's creditors and security holders, which was commenced more than one year before the indictment was found. And the cases in the second line appear to us, as they did to Judge Mishler in his opinion of October 24, 1966, to rest upon the deponent's assertion of his privilege against self-incrimination; to the extent that they do not, we decline to follow them. In both National Discount Corp. *v.* Holzbaugh, supra, and Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil, Inc., supra, the deponents explicitly asserted their privileges against self-incrimination, and the court in Perry *v.* McGuire, supra, cited both cases in holding that interrogatories directed to a criminal defendant "would be oppressive and would infringe on his constitutional rights." 36

F.R.D. at 273. Moreover, all three cases arose on Rule 30(b) motions made in the court in which the civil action was pending; none is a precedent for the injunction Judge Bryan issued.

Of course, if the district court should find that the taking of the depositions of the appellees threatens to interfere with the trial of the indictment or with such preparation of their defenses by the appellees, as may be necessary, the district court has the power to take appropriate action.

Reversed. (The mandate shall go down forthwith).

FEINBERG, Circuit Judge (dissenting):

I dissent.

I would have affirmed on the basis of Judge Bryan's thorough opinion in the trial court. The next best thing to do is to dissent on the basis of that opinion, which is reported at 262 F. Supp. 64. It should be read in conjunction with the majority opinion because Judge Bryan clearly and convincingly states the reasons for the ninety-day injunction under attack. I adopt his basic reasoning and add only a few thoughts addressed to the majority opinion.

Since the district court's power to enjoin is assumed, the issue is one of discretion. The majority largely ignores the basic reason given by the district judge for his exercise of that discretion—that otherwise the criminal trial of these defendants will be fundamentally unfair. If the trial court by order allowed the Government full discovery in the criminal case and denied it to defendants, all would agree that this would be basically unfair. Yet that is what may well happen because of this reversal. The absence of collusion between the trustee in the civil suit and the Government in the criminal suit is not controlling; the effect

of the discovery on defendants in the criminal case is. The majority can see no distinction between use of depositions taken before and after the criminal indictment. To me the distinction is clear. Once the indictment was filed, the court in which those charges were to be tried had the duty to keep the criminal proceedings fair. In the absence of such proceedings, there was, of course, no correlative duty.

In addition, even if I had doubts about the correctness of the trial court's action—and I do not—the reversal is totally uncalled for. The injunction by its terms expires in about two weeks. I see no adequate reason why the conflicting interests cannot be again left to the discretion of the district judge on March 17. At that time, he will be able to appraise the situation again in the light of circumstances then existing. For example, he can consider whether the criminal trial is being unduly delayed by defendants Simon, Kaiser and Fisher, whether they will adhere to the assurance given on oral argument of preparing for a trial date in May, whether a Rule 2 judge has been appointed to expedite that trial, whether it is now true (as apparently it was not on the record before Judge Bryan) that the trustee has no other meaningful depositions to take, and whether, if there is going to be significant delay, it might be practical to allow depositions with appropriate prohibitions on use of them by the Government.

In other words, I think the district judge was right, and, in any event, would allow him to exercise his discretion again on March 17 when the injunction expires. *Cf.* Nederlandse Erts-Tankersmaatschappij, N.V. *v.* Isbrandtsen Co., 362 F. 2d 205 (2d Cir. 1966).

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of March one thousand nine hundred and sixty-seven.

Present: Hon. J. EDWARD LUMBARD, *Chief Judge,*
Hon. J. JOSEPH SMITH,
Hon. WILFRED FEINBERG, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff,

v.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,
Defendants-Appellees,

HAROLD ROTH,
Defendant,

IRVING L. WHARTON,
Appellant.

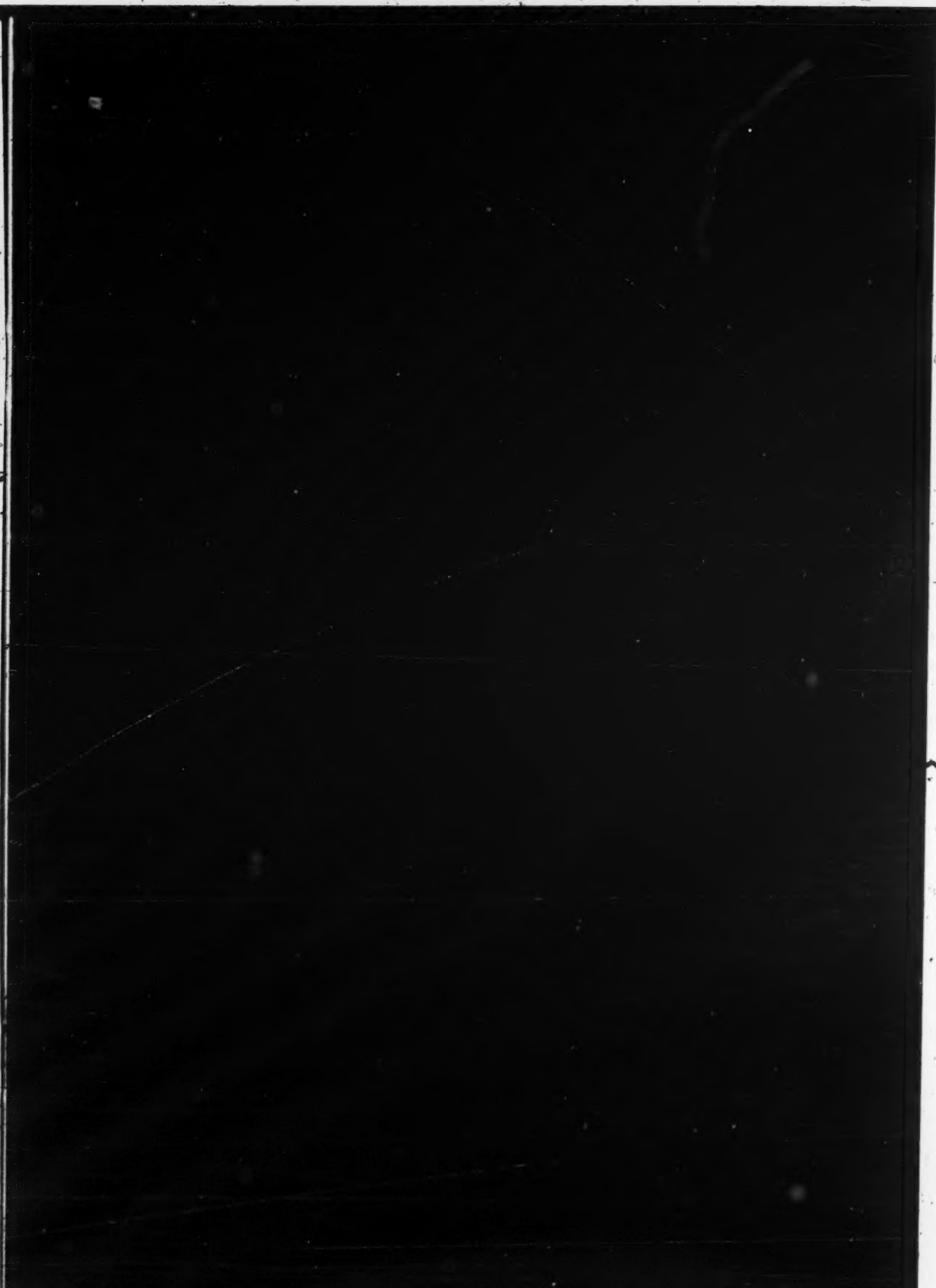
Appeal from the United States District Court for the Southern District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. Daniel Fusaro,
Clerk.



APPENDIX C

Opinion of District Court Filed December 12, 1966

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Crim. 831

UNITED STATES OF AMERICA

v.

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN,

Defendants.

FREDERICK VAN PELT BRYAN, District Judge:

Defendants Simon, Kaiser and Fishman are certified public accountants, the first two of whom are members of the prominent accounting firm of Lybrand, Ross Bros. & Montgomery (Lybrand), and the third a senior associate of that firm. They have pleaded not guilty to a six count indictment filed on October 17, 1966, charging them with conspiracy to commit mail fraud and to make false statements in violation of the Securities and Exchange Act, 18 U.S.C. §§ 371, 1001, 1341; 15 U.S.C. § 78ff, and with substantive mail fraud offenses. 18 U.S.C. §§ 2, 1341. Roth, former president of Continental Vending Machine Corporation (Continental) is also named as a defendant. The Lybrand firm and others are named as co-conspirators but not as defendants.

These criminal charges arise out of the affairs of Continental and a subsidiary which are presently in proceed-

ings for reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Eastern District of New York.

Defendants Simon, Kaiser and Fishman have applied to this court sitting in the criminal action against them in this district for an order enjoining the Trustee in Reorganization of Continental, pending the trial of the criminal action, from taking their depositions and the depositions of other partners and employees of the Lybrand firm in two civil actions in the Eastern District of New York (at least one of which involves the same transactions which are the subject of this indictment against them) and for other relief.

Simon, Kaiser and Fishman assert that the injunctive relief which they seek is necessary in order to preserve the integrity and fairness of the criminal proceedings presently pending, to prevent the complete disclosure to the prosecution in advance of trial of their defense and the evidence upon which it will necessarily rest, and to permit them the necessary time and facilities for the intensive preparation required for a proper defense.

I.

The facts out of which this application arises are as follows:

In July 1965 the Trustee in Reorganization of Continental commenced a civil action in the United States District Court for the Eastern District of New York against the Lybrand firm, the Meadowbrook National Bank and Roth seeking damages of $41,000,000 resulting from alleged acts of defendants in connection with the affairs of Continental. The action is being actively prosecuted by

the plaintiff Trustee. Another civil action by the Trustee arising out of the affairs of Continental against a large number of individuals and corporations was commenced in that District in 1964 and is also being actively prosecuted.

For some time the Trustee of Continental has been taking the depositions of witnesses in the pending civil actions in the Eastern District in preparation for trial. Arrangements had been made to take the depositions of Simon, Kaiser and Fishman. Pursuant thereto the deposition of Simon was taken, which ran to some 1,800 pages and is still open for further testimony at this time. The deposition of Kaiser was scheduled. Before it commenced, however, the present indictment against Simon, Kaiser and Fishman was filed in this court on October 17, 1966.

When the indictment was filed, Kaiser moved in the Trustee's civil actions in the Eastern District before Judge Mishler for a protective order, under Rule 30(b), F. R. Civ. P., staying Kaiser's deposition on the ground that in view of the newly-instituted criminal action against him in the Southern District the taking of the deposition would violate his fifth amendment privilege against self-incrimination and would therefore be oppressive.

On October 24, 1966 Judge Mishler denied Kaiser's motion for a protective order in a memorandum decision. In the course of his memorandum he said that it is "clear that transactions on which the civil claims are stated, in the main, form the basis of the criminal charge." The narrow issue posed before him was whether compulsory appearance for examination was oppressive as violating Kaiser's fifth amendment rights against self-incrimination. Noting that counsel for Kaiser had declined to say whether

Kaiser would assert his constitutional privilege, Judge Mishler held that the fifth amendment privilege did not excuse Kaiser from appearing for examination; that the privilege could only be asserted in answer to specific questions put to him; that Kaiser was free to assert his privilege when questions which might incriminate were put to him, and that his fifth amendment rights were thus fully protected. Kaiser was directed to appear for examination by the plaintiff Trustee on October 26, 1966. An appeal from Judge Mishler's order was dismissed by the Court of Appeals on the ground that the order was non-appealable and an application for a stay was denied on October 25, 1966. Kaiser then appeared for deposition as directed and was examined by the Trustee's counsel on October 31.

On November 1, 1966, attorneys for Simon, Kaiser and Fishman as defendants in the criminal action in this court presented to me, sitting in criminal motion part, an order requiring the Continental Trustee and the United States Attorney for the Southern District of New York to show cause why an injunction should not issue against the Trustee and his attorneys restraining them from taking the testimony of Simon, Kaiser, Fishman or any other partner or employee of Lybrand or from seeking to compel the production of any records of that firm in the civil actions pending in the Eastern District of New York until the trial of the criminal indictment here.

After hearing the attorneys for the Continental Trustee and the United States Attorney, I set down the order to show cause for argument before me in criminal motion part on November 4, 1966, and issued a temporary re-

straining order against taking the depositions of Simon, Kaiser, Fishman and other partners or employees of Lybrand, pending the hearing of the application. The attorneys for the Continental Trustee and the United States Attorney then accepted service of the order to show cause containing the restraining provisions and the accompanying papers.

On November 4, 1966, the return day of the order to show cause, counsel for defendants Simon, Kaiser and Fishman argued in support of the application for injunctive relief and counsel for the Continental Trustee argued in opposition. The United States Attorney took no position on the merits of the application. At the conclusion of the argument decision was reserved. Time was granted to submit additional papers and briefs[1] and the examination of defendants Simon, Kaiser and Fishman and of partners and employees of Lybrand was enjoined from the bench pending determination of the application.

II.

Does this court, sitting in the criminal action pending against the moving defendants, have the power to grant relief of the nature sought here?

[1, 2] There is no doubt that "a fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1954). Moreover, unfairness at any stage of criminal proceedings may affect the fairness of the trial

1. The last papers submitted in the regular course were received on November 16, 1966, though additional papers were submitted on December 1 and December 9.

itself and imperil any judgment of conviction under a system of law such as ours which "has always endeavored to prevent even the probability of unfairness." *Ibid.*

[3] It is clear to me that a district court having jurisdiction over a criminal action, see 18 U.S.C. § 3231, has the power in appropriate circumstances to grant injunctive relief to preserve the fairness and integrity of the criminal proceedings before it. Such power stems from either one or both of two sources.

[4] First, 28 U.S.C. § 1651 (the All Writs Act) provides that United States District Courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." The All Writs Act has been held to have been properly invoked in aid of the jurisdiction of the federal courts in, for example, the areas of bankruptcy, Steelman *v.* All Continent Corp., 301 U. S. 278, 57 S. Ct. 705, 81 L.Ed. 1085 (1937), (injunction against prosecution of suit in another District Court), stockholder litigation, Havner *v.* Hegnes, 269 F. 537 (8 Cir. 1920), (injunction against prosecution of action in State Court) and civil rights. Bulloch *v.* United States, 265 F. 2d 683, 691 (6 Cir.), cert. den., 360 U. S. 909, 79 S. Ct. 1294, 3 L.Ed. 1260 (1959). Indeed, the Supreme Court in *Steelman* speaks of the enjoining by the bankruptcy court of suits in other federal courts even where "they have a tendency to embarrass administration • • •." 301 U. S. at 289, 57 S. Ct. at 710. It can scarcely be said that federal courts have less power where criminal proceedings are concerned. Thus a federal criminal court is empowered to grant relief affecting other litigation pending in the federal courts

where "necessary and appropriate" to protect the fairness and integrity of criminal proceedings before it.[2]

[5] Second, apart from the All Writs Act, the federal criminal court has other powers to grant injunctive relief to protect the fairness of the criminal proceedings before it. Whether this be said to derive from the court's inherent equity jurisdiction,[3] or from its supervisory powers over the administration of criminal justice both generally and under the Federal Rules of Criminal Procedure, is not of great consequence.

As Justice Frankfurter said in McNabb *v.* United States, 318 U. S. 332, 340, 63 S. Ct. 608, 613, 87 L.Ed. 819 (1943), judicial supervision of the administration of federal criminal justice by the federal courts "implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." See also Nardone *v.* United States, 308 U. S. 338, 339, 342, 60 S. Ct. 266, 84 L.Ed. 307 (1939).

The Federal Rules of Criminal Procedure, "intended to provide for the just determination of every criminal pro-

2. See the discussion of the original version of the All Writs Act in Wayman *v.* Southard, 23 U. S. (10 Wheat.) 1, 22-24, 6 L.Ed. 253 (1825); cf. McCulloch *v.* State of Maryland, 17 U. S. (4 Wheat.) 316, 413-425, 4 L.Ed. 579 (1819).

3. Cf. Rudnicki *v.* McCormack, 210 F. Supp. 905, 909 (D. Mass. 1962), appeal dismissed sub nom Rudnicki *v.* Cox, 372 U. S. 226, 83 S. Ct. 679, 9 L.Ed. 2d 714 (1963). See also Landis *v.* North American Co., 299 U. S. 248, 57 S. Ct. 163, 81 L.Ed. 153 (1936).

ceeding," must be construed by the courts "to secure • • • fairness in administration." Rule 2. And the courts are authorized, if no procedure is specifically prescribed by rule, to "proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Rule 57(b); cf. Petition of Petrol Shipping Corp. *v.* Kingdom of Greece, Ministry of Com., 360 F. 2d 103 (2 Cir. 1966).

[6] These powers of the federal criminal court are not confined to the protection of an identified federal constitutional right. McNabb *v.* United States, supra. Nor may these powers be used only against participants in criminal proceedings pending before the court. They extend to policing the requirements of the federal rules in the interests of fundamental fairness even against persons coming within their jurisdiction who are not parties to proceedings. Rea *v.* United States, 350 U. S. 214, 76 S. Ct. 292, 100 L.Ed. 233 (1956); see Go-Bart Importing Co. *v.* United States, 282 U. S. 344, 51 S. Ct. 153, 75 L.Ed. 374 (1931); In re No. 32 East 67th Street, Borough of Manhattan, City of New York, 96 F. 2d 153 (2 Cir. 1938). See also Wise *v.* Henkel, 220 U. S. 556, 31 S. Ct. 599, 55 L.Ed. 581 (1911).

The broad supervisory power vested in the criminal courts to protect proceedings before them against unfairness is dramatically emphasized in a different context by Justice Clark's recent opinion in Sheppard *v.* Maxwell, 384 U. S. 333, 86 S. Ct. 1507, 16 L.Ed. 2d 600 (1966). That case dealt with the failure of a state trial judge to fulfill his duty to protect the defendant from inherently prejudicial publicity which saturated the community and

to control disruptive influences in and out of the courtroom. A Federal criminal court certainly has at least as much power to prevent "prosecutors, counsel for defense, the accused, witnesses, court staff, [or] enforcement officers coming under the jurisdiction of the court" from engaging in conduct which is likely to result in an unfair trial. 384 U. S. at 363, 86 S. Ct. at 1522.

[7] The powers vested in the federal courts to protect against unfairness in the administration of federal criminal justice must necessarily extend also to litigants and attorneys in civil actions in the federal courts where the use of federal civil process threatens such unfairness.

III.

[8, 9] When and under what circumstances should such power be exercised? Plainly it should not be invoked without due caution and restraint. The burden of showing the probability of "essential unfairness * * * as a demonstrable reality," Adams *v.* United States ex rel. McCann, 317 U. S. 269, 281, 63 S. Ct. 236, 242, 87 L.Ed. 268 (1942), Sheppard *v.* Maxwell, supra, 384 U. S. at 351-352, 86 S. Ct. 1507, rests on the party invoking the power. In all but a few extreme cases prejudice to the accused must be identifiable. Estes *v.* State of Texas, 381 U. S. 532, 542-543 85 S. Ct. 1628, 14 L.Ed. 2d 543 (1965). Moreover, as in any other application for relief in the nature of injunction the prejudice to the party seeking relief must be weighed against any prejudice to the persons against whom relief is sought. But upon a proper showing of the probability of unfairness which may affect the

course of the criminal proceedings the criminal court has not only the power but the duty to act.

IV.

I turn then to the contentions and the facts on the present application.

(a)

It is not seriously disputed that the subject matter of this indictment and that of the complaint in the civil action against Lybrand are in the main the same. Both charge fraud with respect to a number of the same transactions. It may be noted that this is not a routine criminal case. The indictment, insofar as I am aware, is the first in which charges of mail fraud based on transactions of this nature have been brought against leading certified public accountants. It has received substantial publicity and comment in the press.[4]

As appears from the complaint and the indictment, these charges involve a very complicated set of facts which resulted in an alleged loss of over forty million dollars to Continental, forcing it into Chapter X proceedings. The difficulty and complexity of the matters involved is to some extent indicated, among other things, by the printed complaint of some fifty pages in the civil action against Lybrand as well by the fact that, as I have mentioned, the deposition of defendant Simon taken before the indictment was returned (and which is still open) has already run to some 1,800 pages. Moreover, the transcript of the two

4. N. Y. Times, Oct. 18, p. 61, col. 7; Wall St. Journal, Oct. 18, p. 32, col. 2.

days of testimony of defendant Kaiser, taken before this application was made, shows that the questioning of Kaiser by counsel for the Trustee, largely in the nature of cross-examination, has been sharp and searching.

Defendants Simon, Kaiser and Fishman urge that if their depositions are taken at this time by the Continental Trustee in the pending Eastern District civil actions it is reasonably probable that they will suffer irreparable prejudice in the defense of the criminal action against them and that the resulting unfairness may well impair the integrity of the criminal proceedings. They say that the continuation of these examinations will, in all likelihood, result in a disclosure to the prosecution before trial of their entire defense in the criminal action; that they will be forced to reveal the nature and details of their defense, the evidence on which it will be based, their trial tactics and strategy and the positions which they will take on the stand; that this will permit the prosecution to circumvent the restrictions on discovery in the Federal Rules of Criminal Procedure; that the prosecution will be given an undue and highly unfair advantage over the defense; and that if injunctive relief is not forthcoming the resulting unfairness is likely to impair the integrity of the trial and to have serious due process implications.

Defendants' position does not rest on protection of their rights against self-incrimination under the fifth amendment. Indeed, counsel for the defendants has flatly stated to the court that the defendants have no intention of asserting their fifth amendment privilege and will not do so under any circumstances. Defendants state that because of their professional position and standing in the business community they are in no position to take the fifth amend-

ment even if they were so minded. They insist that they are wholly innocent of the charges against them, that they wish to have all the relevant facts and circumstances completely brought out in the course of their defense at the proper time, but that they should not be compelled to do so before trial.

The Trustee points to the fact that the Government is not a party to the civil suit, and that his examinations are not being conducted for the purpose of exposing the defense in the criminal action but for legitimate purposes of the civil suit. As mentioned, the United States Attorney originally did not take any position on the merits of the application. But it is significant that he strenuously opposed the suggestion, made during the course of argument, that there might be an interdiction of any communications between the Trustee and the prosecution concerning the depositions or their subject matter.

It is not denied that during the course of the Trustee's investigations and preparations for trial information affecting the criminal prosecution, transcripts of examination and exhibits have been available to the United States Attorney. That, of course, was entirely proper and to be expected of a diligent prosecutor.

It also can be reasonably anticipated that if the depositions of the moving defendants continue to be taken, the United States Attorney will have full information as to their contents with consequent full disclosure of defendants' case in advance of trial. That there is no deliberate collusion between the Trustee and the United States Attorney's Office is not controlling. The fact of the matter is that if the examinations of these defendants in the civil action are continued, the prosecution is likely to discover

—and make use of—vital information about the defense which it could not otherwise secure. The problem here transcends that of dealing with specific answers to specific questions, which may or may not be adequately handled by the trial court. Rather it relates to the disclosure of the defendants' entire case and the evidence upon which they will rely.

(b)

[10] It is unnecessary to dwell at any length on the wide differences between discovery in civil and criminal cases. The deposition and discovery process in civil litigation rests upon a broad footing of full mutual disclosure of information. On the other hand, the Rules of Criminal Procedure restrict disclosures to a minimum. As Judge Wisdom said in Campbell *v.* Eastland, 307 F. 2d 478, 487 (5 Cir. 1962):

> "There is a clear-cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.
>
> • • • • •
>
> "• • • While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Compare Rules 26 through 37, Fed.R.Civ.P., • • • with Rules 15, 16, and 17, Fed.R.Crim.P., • • •. Separate policies and objectives support these different rules."

The contrasts between the policies and objectives of the civil and criminal procedure are particularly apparent in the provisions of the respective rules relating to depositions. The civil rules permit both sides the broadest latitude in taking the deposition of any person, including a party, on any matter "relevant to the subject matter involved in the pending action." Rule 26(b), F.R.Civ.P. The scope of examination even extends to the identity and location of persons having knowledge of relevant facts and matters reasonably calculated to lead to the discovery of admissible evidence. Full cross-examination of adverse parties or hostile witnesses is permitted. Rule 26(b), (c), F.R.Civ.P.

Of course, in criminal cases depositions of parties are not permitted at all and depositions of witnesses are confined to those who are absent, as provided in Rule 15, F.R.Cr.P. What little discovery of documents, statements and tangible objects is allowed to the prosecution, is subject to severe restrictions even under the liberalized provisions of new Rule 16.[5]

[11] Thus, while in civil litigation "[t]he way is now clear, consistent with recognized privileges, for the par-

5. Rule 16(c) reads in pertinent part:

"(c) Discovery by the Government. *If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule,* it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, *upon a showing of materiality to the preparation of the government's case and that the request is reasonable.*" (Emphasis added.)

ties to obtain the fullest possible knowledge of the issues and facts before trial," Hickman *v.* Taylor, 329 U. S. 495, 501, 67 S. Ct. 385, 389, 91 L.Ed. 451 (1947), criminal litigation has made no such concessions to modern concepts. It is still conducted largely on the "sporting" theory of justice. That only serves to emphasize the necessity for the rules of the game being applied equally to both prosecution and defense so that neither can obtain unfair advantage over the other.

[12] If there is reasonable probability that either the prosecution or the defense will be able to secure a full disclosure of the other side's case while relying on the rules to prevent disclosure of its own, there is, as I view it, unfairness likely to affect the result of the trial of such importance and significance as to require the intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it.

(c)

The practical effect of denying injunctive relief against the taking of the depositions of the three criminal defendants at this time is likely to permit the prosecution to have full disclosure in contravention of the protections given defendants by the Rules of Criminal Procedure. The question to be decided here is whether requiring the defendants to submit to examination in these related civil actions will so prejudice their rights to defend themselves against the criminal charges as to justify this court in using its injunctive powers.

[13] The problem is by no means novel. It has been consistently held that where both civil and criminal pro-

ceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter. This has been true whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence, see Campbell *v.* Eastland, 307 F. 2d 478 (5 Cir. 1962), cert. den., 371 U. S. 955, 83 S. Ct. 502, 9 L.Ed. 2d 502 (1963); United States *v.* $2,437.00 United States Currency, D.C., 36 F.R.D. 257 (E.D.N.Y. 1964); United States *v.* Steffes, 35 F.R.D. 24 (D. Mont. 1964); United States *v.* Maine Lobstermen's Association, 22 F.R.D. 199 (D. Maine 1958); United States *v.* Linen Supply Institute of Greater New York, 18 F.R.D. 452 (S.D.N.Y. 1955); United States *v.* Bridges, 86 F. Supp. 931 (N.D. Calif. 1949); United States *v.* A. B. Dick Co., 7 F.R.D. 442 (N.D. Ohio 1947); Zara Contracting Co. *v.* State of New York, 22 A.D. 2d 415, 256 N.Y.S. 2d 98 (3rd Dep't. 1965); United States *v.* One 1964 Cadillac Coupe, — F.R.D. —, (S.D.N.Y. 1966); United States *v.* One 1963 Chevrolet Sedan, Misc. No. 63-M-1239 (E.D.N.Y. 1963), or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution. See Perry *v.* McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964); Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil Co., Inc., 14 F.R.D. 333 (E.D. Pa. 1953); National Discount Corp. *v.* Holzbaugh, 13 F.R.D. 236 (E.D. Mich. 1952). But see Hiss *v.* Chambers, 8 F.R.D. 480 (D. Md. 1948).

[14] The controlling consideration in these cases appears to be the protection of the paramount public interest in ensuring the essential fairness of criminal proceedings

under the Rules of Procedure laid down for their conduct. Thus while Paul Harrigan & Sons, Inc., supra, seems to be predicated on the probability that the attempted discovery would violate the defendants' fifth amendment privilege against self-incrimination, Perry *v.* McGuire, supra, and National Discount Corp. *v.* Holzbaugh, supra, apparently were based on the broader ground of the inherent unfairness of compelling disclosure of a criminal defendant's evidence and defenses before trial. And it may be noted that in the many cases where civil discovery has been stayed to prevent disclosure of the evidence to be used by the Government in the criminal prosecution, no fifth amendment self-incrimination question could arise.

It would be wholly unrealistic to suppose that the prosecution in a criminal proceeding would not gain a very substantial advantage over the defendants if the nature of their defense and the evidence on which the defense was based were disclosed to the Government in advance of—and indeed here long in advance of—trial. Every experienced trial lawyer knows well the advantages the prosecution would be likely to gain under such circumstances.

With such material at its disposal a zealous prosecutor would be able to tailor his case to overcome anticipated defenses and avoid any possibility of surprise. If the defendants took the stand in their own defense, as appears probable in this case, there will already have been a thorough cross-examination of each of them by able and zealous counsel, a very material advantage to the prosecution in conducting its own cross-examination. The advantages gained to the prosecution might well be sufficient to tip the scales in favor of conviction particularly in a

close case. Under these circumstances the prosecution should not be permitted "to obtain information through the medium of the civil proceedings to which [it was] not entitled, or in a manner in which [it was] not entitled, under the criminal rules." United States *v.* Maine Lobstermen's Ass'n, D. C., 22 F.R.D. 199, 201 (D. Maine 1958); see Campbell *v.* Eastland, supra. This would circumvent the limitations provided by the criminal rules to ensure the fair administration of criminal justice from the standpoint both of the defense and prosecution.

It is no answer to the contentions raised here to say that injunctive relief should not be granted against the Trustee because the extent of the prejudice or harm which might result to the criminal defendants cannot be presently evaluated in view of the mass of information already available about the transactions which are the subject of the indictment and the civil complaint. That argument defeats itself. The more complicated and voluminous the facts and the more difficult the issues, the more probable it is that such harm may occur.

[15] Nor do the facts that two of the defendants have appeared before the Grand Jury, that Simon has already been examined by the Trustee at length and Kaiser to some extent, and that other persons connected with Lybrand have also been examined indicate that defendants should be denied relief. Each of the three defendants has been newly-charged individually with serious crimes. It has not been shown here that the full nature and details of their respective individual defenses to those charges have been already exposed. Indeed it is likely that the details of their defenses are still being formulated. It is precisely

because it is difficult to forecast the precise harm which may result to the defendants that injunctive relief is necessary for their protection.

[16] Nor is it a solution to the problem raised here to say that defendants could fully protect themselves from any disclosure by raising their fifth amendment privilege against self-incrimination when specific questions are put to them. Not only have they taken the position that they will not assert their fifth amendment privilege but they do not in any way rely on their fifth amendment rights on this application.

[17] The rights on which defendants rely here are those governing the conduct of criminal proceedings with a view to assuring the fair administration of criminal justice to all parties. The supervisory powers of the federal courts over the administration of criminal justice are not confined to protecting the accused against fifth amendment violations. Thus in McNabb *v.* United States, supra, the Supreme Court did not rely on fifth amendment rights against self-incrimination as a ground for denying the prosecution the use of incriminating statements by the accused since the statements appeared to have been voluntary. It held, however, that the statements could not be admitted because defendant's statutory rights to a prompt arraignment had been violated. As the Court said, the scope of the power resting in the criminal courts was "not confined to ascertainment of Constitutional validity." 318 U. S. at 340, 63 S. Ct. at 613. It held the prosecution was barred from using the statements "[q]uite apart from the Constitution." Id. at 341, 63 S. Ct. 608. See Nardone *v.* United States, supra. Compare Casenote, 76 Harv. L. Rev. 838 (1963).

Similarly, if the search and seizure provisions of Rule 41 of the Rules of Criminal Procedure are violated it is not a prerequisite to relief by the federal criminal court that the violations rise to constitutional dimensions. In Rea *v.* United States, supra, for example, a federal agent was enjoined from testifying in a state criminal trial concerning material obtained by a search and seizure in violation of Rule 41 of the Federal Rules of Criminal Procedure. The court said:

> "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. * * * The power of the federal courts extends to policing those requirements and making certain that they are observed." 350 U. S. at 217, 76 S. Ct. at 294.

And it went on to say "[t]o enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them." Ibid.

[18] I see no reason why a defendant should be compelled to assert his fifth amendment privilege against self-incrimination against his will in order to protect other and different rights granted him by rule, statute, constitution, or even considerations of basic fairness. The situation presented here is plainly an unusual one. It is not often that defendants elect to eschew their fifth amendment privilege at whatever cost.[6] It may be said

6. In addition, both Kaiser and Simon, who have already given testimony on deposition may well be foreclosed from now invoking the fifth amendment in any event by reason of "waiver." E.g., Rogers *v.* United States, 340 U. S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951); Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L.Ed. 819 (1896).

that though the assertion of the privilege theoretically carries no stigma and in practical effect should not, defendants' election not to take the privilege is quite understandable in the light of much current public reaction. As a matter of "common sense," many disabilities may flow from invocation of the fifth amendment. Hook, Common Sense and the Fifth Amendment (1957); see Ullmann *v.* United States, 350 U. S. 422, 430-431, 76 S. Ct. 497, 100 L.Ed. 511 (1956). See also Nelson *v.* County of Los Angeles, 362 U. S. 1, 80 S. Ct. 527, 4 L. Ed. 2d 494 (1960); Lerner *v.* Casey, 357 U. S. 468, 78 S. Ct. 1311, 2 L.Ed. 2d 1423 (1958). I see no reason why defendants should be penalized for electing to relinquish the privilege by being deprived of protection against the violation of other rights resting on an entirely different footing.

Finally, no alternative remedy appears to afford defendants adequate relief in the circumstances. This is a case where the "uncertainty surrounding the adequacy" of available remedies justifies action by the District Court retaining jurisdiction. Township of Hillsborough, Somerset County *v.* Cromwell, 326 U. S. 620, 626, 66 S. Ct. 445, 90 L.Ed. 358 (1946).

The suggestion that the prosecution should be denied access to any depositions of the defendants hereafter taken by the Trustee and that communications between the Trustee and the prosecution regarding such depositions or their subject matter should be forbidden (a suggestion strenuously resisted by the United States Attorney) is an unrealistic approach to the problem. In view of the scope and complexity of the case and the

large amount of relevant testimony and exhibits it would be virtually impossible to isolate the subject matter covered by the depositions from the volume of material to which the prosecution was legitimately entitled. Indeed, were such a direction given it might seriously handicap the prosecution in the legitimate preparation of its case as the United States Attorney has urged. These considerations point up the difficulties which are implicit in this highly unusual situation.

[19] The suggestion that the trial court might suppress the depositions is equally unrealistic and impractical. Even if a motion to suppress would lie under Rule 41(a), F. R. Cr. P. (and this is highly doubtful to say the least), it is likely that it could be granted only on the ground that the prosecution had improperly connived at the taking of the depositions. And if there was such connivance the defendants would be entitled to relief on their present application. Furthermore, once the depositions of the defendants are taken the cat is out of the bag and the major damage is done. If, as appears likely, defendants are irreparably prejudiced it may well be too late for the trial court to take corrective measures to ensure the fairness and integrity of the trial.

[20] I find therefore that there is a reasonable probability that defendants Simon, Kaiser and Fishman will suffer substantial and irreparable prejudice in their defense of the criminal charges against them if the Trustee continues to take their depositions at this time and that it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings.

V.

I recognize that the civil litigation brought by the Continental Trustee in the Eastern District affects the interests of the large number of public shareholders of Continental and that the reorganization of that large corporate entity and its subsidiary under Chapter X of the Bankruptcy Act is to a large degree dependent on the results of that litigation. Any prejudice to these substantial public interests which may result from delay in taking the depositions of Simon, Kaiser and Fishman or any others in these civil suits must of course be balanced against any prejudice to the criminal defendants if the depositions proceed. However, the Continental Trustee has failed to persuade me that any prejudice of substance will result if the depositions of Simon, Kaiser and Fishman are delayed for a reasonable period.

It is stated in the moving papers, and not denied, that the Trustee intends to take the depositions of some 32 persons in the course of the preparation of the civil litigations in which he is plaintiff, some twenty of whom are not partners or employees of Lybrand. The deposition of defendant Simon has already been substantially completed. Kaiser's deposition has been commenced. Fishman's is still to come.

Nothing has been shown to me indicating the necessity for any immediate examination of Fishman or the continuance of the examination of Simon and Kaiser at this stage of the civil pretrial proceedings. The civil case against Lybrand has been pending since August 1965. It appears that it still will be a long time before the depositions of the many witnesses other than Simon,

Kaiser and Fishman can be completed. No reason has been advanced why the depositions of the other witnesses and parties cannot proceed expeditiously if the examinations of the three criminal defendants are postponed for a reasonable time. The most that can be said on the facts before me is that the Trustee will be inconvenienced by a delay in examining these three defendants.

I find that when the effect of a reasonable postponement of the defendants' depositions on the civil actions pending in the Eastern District and the public interests there involved is balanced against the prejudice which may result to the defendants from the conduct of such examinations at the present time, the scales are tipped overwhelmingly in defendants' favor.

VI.

[21] It is suggested by the Continental Trustee that Judge Mishler's decision in the Eastern District civil litigation denying Kaiser's motion for a protective order under Rule 30(b), F. R. Civ. P., should control the present application. I do not agree.

Of course Judge Mishler's decision deals only with a motion of defendant Kaiser. Neither Simon nor Fishman have made any applications in the civil suits and plainly as individual criminal defendants could not be bound by any decision on a motion by another.

[22] As to Kaiser, the issues before me are different from and much broader than those passed upon by Judge Mishler. As I have previously mentioned, the question before him was whether appearance by Kaiser for examination would be oppressive because it would be in viola-

tion of his fifth amendment rights against self-incrimination. Judge Mishler held only that the fifth amendment privilege did not protect against appearance for examination but must be asserted in response to specific questions put to the witness. He denied Kaiser's motion for a protective order under Rule 30(b) on that ground.

Since then the three criminal defendants have made it clear that none of them will assert his fifth amendment privilege.

As the previous discussion has indicated, the questions posed before me on the present application are not questions relating to fifth amendment rights against self-incrimination. They concern the different rights of the defendants to a fair criminal trial under the procedures provided by the Rules of Criminal Procedure. They involve the power and the duty of the federal criminal court to protect such rights and to take such action as may be necessary to prevent unfairness in the criminal proceedings before it—unfairness that well may also have due process implications which cannot be accurately forecast at this writing.

Having found that it is reasonably probable that if these depositions are taken now essential unfairness will result which will threaten the integrity of the criminal proceedings, this court may not shirk its duty to protect the criminal process before it from that probability.

VII.

Thus far the discussion has been concerned mainly with the depositions of the three criminal defendants. The application of the defendants seeks additional relief going

considerably beyond those three depositions. Those claims must also be disposed of.

[23] (a) Defendants ask that the Trustee be enjoined from examining any other partners or employees of the Lybrand firm which is named in the indictment as a co-conspirator. It has not been demonstrated to me that any substantial prejudice to the defendants is likely to accrue if such examinations are continued by the Trustee, in the light of the information already made available by the firm. The Trustee will not be barred from taking the depositions of any persons other than the three criminal defendants.

[24] (b) Defendants ask that the Lybrand files, now held by agreement in a conference room at the Lybrand offices and available equally to counsel for the Lybrand firm and the Trustee, should for all practical purposes be placed in the sole custody of the defendants or their counsel. These files and documents appear to have been fully available at all times to the Trustee, and indeed, to the Government. There is no reason why they should not continue to be held as they now are under presently existing arrangements.

[25] (c) Defendants urge that unless the examinations of other Lybrand partners and employees are stayed and the Lybrand files and documents are made available exclusively to them and their counsel, they will be unable properly to prepare for trial. I see no reason why this should be so. Depositions can only be taken one at a time. There should be ample time for counsel for the defendants to confer with any Lybrand partners or employees. The

Trustee is prepared to cooperate in making any documents which are needed fully available for use and study in aid of the criminal defense. The criminal defendants have ample legal manpower at their disposal. There is no likelihood that the defendants' preparation for trial will be unduly hampered by the continuation of the Trustee's examinations of Lybrand partners and employees or from continuation of the present arrangement with respect to the Lybrand documents. No injunctive relief on these grounds is justified.

VIII.

There remains the question of remedy to be afforded Simon, Kaiser and Fishman.

In fashioning such remedy it is plainly important that there be a minimum of interference with the conduct of the civil actions by the Continental Trustee.

As I have indicated, a reasonable postponement of the depositions of the individual criminal defendants does not appear to be much more than an inconvenience to the Trustee and his counsel and will not substantially affect the orderly progress of the civil actions.

Both the prosecution and the defendants have stated that they wish to try the criminal case in this court as promptly as possible. The Government estimates that it will be ready for trial by mid-February 1967. The defendants expect to be ready by early April. Given maximum efforts by both sides to complete their preparation for trial, it can be expected that the criminal trial could get under way some time between those dates, or perhaps even earlier.

[26] Taking into account all the circumstances here, the Trustee will be enjoined for a period of ninety (90) days from the date of the order to be entered on this opinion from continuing the depositions of defendants Simon and Kaiser and from taking the deposition of Fishman in the civil actions in the Eastern District. At the conclusion of that period defendants may apply for further relief with respect to such depositions on good cause shown.

Beyond this all other injunctive relief which the defendants seek is denied and any and all other restraints upon the Trustee hitherto imposed are hereby dissolved.

An order will be settled so providing on two (2) days notice.

The foregoing opinion constitutes my findings of fact and conclusions of law on this application for injunctive relief.

APPENDIX D

Opinion and Order of the District Court Dated March 17, 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 831

UNITED STATES OF AMERICA,

Plaintiff,

against

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN,

Defendants.

MEMORANDUM

BRYAN, District Judge:

On December 16, 1966 an order was entered in this criminal action enjoining Irving L. Wharton, as Trustee in Reorganization of Continental Vending Machine Corporation and Continental Apco, Inc. in a Chapter X proceeding in the United States District Court for the Eastern District of New York (the Trustee), his attorneys and agents from continuing the depositions of defendants Simon and Kaiser and from taking the deposition of defendant Fishman in two civil actions in the Eastern District entitled Wharton *v.* Lybrand, et al., 65 Civil 664, and Wharton *v.* Roth, et al., 64 Civil 946, until and including March 17, 1967. The order further pro-

ded that at the conclusion of that period the moving defendants might apply for further relief with respect to those depositions on good cause shown.

On appeal by the Trustee, the Court of Appeals for the Second Circuit, in an opinion dated March 3, 1967, reversed the injunction order of December 16, 1966, with a dissenting opinion by Judge Feinberg, and directed that "The mandate shall go down forthwith."

Thereafter the moving defendants applied to Mr. Justice Harlan for a stay of the mandate of the Court of Appeals and for a continuance of the order which had been reversed beyond its expiration date of March 17, 1967, pending an application to the Supreme Court for a writ of certiorari and if such writ were granted, until the issuance of the judgment of the Supreme Court. On March 13, 1967 Mr. Justice Harlan in a memorandum opinion made the following disposition of that application:

> "Having considered the papers on both sides, I cannot regard the issues sought to be reviewed as insubstantial. I am of the opinion, however, that continuance of the District Court's injunction order, presently expiring by its own terms on March 16, 1967 [footnote omitted] is best left to that court.
>
> "Accordingly, I dispose of this application as follows. I deny the application for a continuance of the District Court's injunction order pending certiorari, without prejudice to the petitioners promptly applying to the District Court for a continuance. I stay the execution and enforcement of the judgment entered pursuant to the mandate of

the Court of Appeals pending this court's disposition of and determination upon the petition for certiorari, on condition however that such petition is filed on or before March 23, 1967."

Mr. Justice Harlan entered an order staying the execution and enforcement of the judgment of reversal entered in this court pursuant to the mandate of the Court of Appeals pending the action of the Supreme Court on a petition for certiorari to be filed by March 23, 1967. The order further provided that if the petition for certiorari is denied the stay terminates automatically but that if certiorari is granted the stay remains in effect pending the issuance of the judgment of the Supreme Court.

In this posture of the case defendants Simon, Kaiser and Fishman move before me for a continuance of the injunction order expiring on March 17, 1967, during the pendency of their petition to the Supreme Court for a writ of certiorari and thereafter, in the event that such petition is granted, pending the issuance of judgment in the Supreme Court. Mr. Justice Harlan expressly left the issue of whether the injunction should be continued to the District Court.

The first question is what standards and principles should be applied in determining that issue. The Trustee's position on that question is as follows:

"We stand fully on the opinion of the Court of Appeals which reversed your Order of December 16, 1966 and maintain that this opinion expresses the law in this district binding upon you until reversed by some higher court. Accordingly, any decision by

you in this application inconsistent with that opinion, we believe to be inappropriate."

The moving defendants, on the other hand, contend that the standards and principles set forth in my opinion of December 12, 1966 (262 F. Supp. 64), granting the injunction order must govern.

It does not seem to me that the position taken by the Trustee can be correct. Were the standards and principles of the opinion of reversal of the Court of Appeals applied, the present application would have to be denied out of hand. The "not insubstantial" questions which the defendants seek to have reviewed by the Supreme Court by petition for writ of certiorari would become moot. The leave given to the defendants by Mr. Justice Harlan to file their petition in the Supreme Court by March 23, 1967 would be an empty gesture since there would be no questions remaining for determination by the Supreme Court. Mr. Justice Harlan's stay of the execution and enforcement of the judgment of the District Court entered on the mandate of the Court of Appeals would be meaningless.

Thus, in determining the present application I must necessarily follow the principles and standards enunciated in my prior opinion.

The moving defendants, while conceding that the factual situation which prevailed last December when the injunction order was issued has changed somewhat, urge that the basic considerations on which that order was based still prevail. These considerations are fully discussed in my opinion and need not be repeated here.

Defendants urge further that the injunction should be continued to permit them to present to the Supreme Court the questions which they seek to raise there and point out that otherwise the substantial rights which they seek to protect will be irretrievably lost.

The Trustee opposes the continuation of the injunction in any respect even under the standards and principles of the prior opinion of this court. He takes the position that the factual situation on which the injunction was granted last December has since so materially changed that the necessity for injunctive relief to protect the defendants' rights to a fair trial no longer exists. He urges further that in any event the equities in favor of the Trustee now so far outbalance the equities in favor of the criminal defendants as to require that the injunction order be dissolved.

It is true that the original expectation of the defendants that the criminal case would be tried in April or May of this year has proven overly optimistic. However, both sides agree that the criminal case is difficult and complex and it is not disputed that both the defendants and the prosecution have proceeded with due diligence. It now appears likely that the criminal case will be ready for trial immediately after the summer.

The civil cases in the Eastern District of New York are by no means ready for trial either. The Trustee says that substantially all of the numerous depositions which he must take have been completed, with the exception of those of Simon, Kaiser and Fishman. This did not appear to be so last December. The Trustee estimates that if

he is now permitted to take these depositions, which he says will take some five weeks, the principal civil case in the Eastern District will be ready for trial in August.

Yet no depositions at all have been taken by the defendants in that action and their discovery has not commenced. The Trustee apparently insists that the order of priority must be maintained and that no discovery by defendants can commence until his has been completed. Without necessarily accepting the estimate of counsel for those defendants that at least six months will be required to take the necessary depositions on their behalf and to complete discovery, it is plain that a substantial amount of testimony by deposition will have to be taken on defendants' behalf. Under these circumstances it appears unlikely that the civil action would be ready for trial appreciably before the criminal action, and it is possible that the two may be on a collision course. In such event the Trustee concedes that the trial of the criminal case should take place first.

The Trustee also contends that information already disclosed to the Government through the testimony of the criminal defendants before the Grand Jury and by memorandum of their counsel makes the protections afforded to the defendants by the injunctive order no longer necessary. But I am not persuaded that such material as has been already disclosed makes the immediate taking of the proposed depositions by the Trustee any less a threat to the fundamental fairness of the criminal trial than it was on the original application.

Acceptable alternative solutions to the problem by way of modification of the injunction order as it now stands—

for example, as suggested in Judge Feinberg's dissenting opinion, "to allow depositions with appropriate prohibitions on use of them by the Government"—not only present major practical difficulties which all the parties recognize but, as I view it, would not be permissible under the majority opinion of the Court of Appeals, which will go into full force and effect if the petition for writ of certiorari is denied. Whatever rights the criminal defendants were deemed to have under the decision of this court granting injunctive relief which they seek to have reinstated by the Supreme Court would therefore be lost.

On the other hand, if the Supreme Court should grant certiorari, the "not insubstantial" questions raised, which, as the Court of Appeals pointed out, are of first instance, will be finally resolved. Any steps necessary to afford protection to the rights of the competing interests before the court can then be taken.

It seems likely that the defendants' petition for writ of certiorari will be determined in a very few weeks. If the writ is granted no doubt the Supreme Court will give full consideration to an application for early argument and disposition of the case.

Taking all the facts and circumstances into account, I conclude that there is reasonable probability that if the injunction order expiring on March 17, 1967 is not continued in effect for at least a limited period such unfairness in the criminal trial is likely to result as to require the continued intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it.

Opinion and Order of the District Court Dated March 17, 1967

In my view the prejudice to the defendants were the injunction order not so continued substantially outbalances any prejudice to the Trustee and the interests he represents.

Therefore, in the exercise of my discretion I grant the application of the defendants to the extent that the provisions of the injunction order of December 16, 1966, will continue pending the determination by the Supreme Court of a petition for writ of certiorari to be filed by the defendants not later than March 23, 1967. If the petition is denied the injunction order will thereupon be dissolved pursuant to the mandate of the Court of Appeals. If the petition is granted the provisions of the injunction order will continue in force and effect until the issuance of the judgment of the Supreme Court.

It is so ordered.

The foregoing memorandum constitutes my findings of fact and conclusions of law on this application.

Dated: New York, N. Y.
March 17, 1967

FREDERICK VP. BRYAN
United States District Judge

APPENDIX E

Constitutional Provision, Statutes and Rules Involved

U. S. Constitution

AMENDMENT V

(Excerpted in pertinent part)

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . ."

28 U.S.C. §1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rules of Criminal Procedure for the United States District Courts

Rule 2. **Purpose and Construction.** These Rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 57(b). PROCEDURE NOT OTHERWISE SPECIFIED. If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Office-Supreme Court, U.S.
FILED
OCT 6 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 72

UNITED STATES OF AMERICA,

vs.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Defendants-Petitioners.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco., Inc.,

Non-Party Respondent.

NON-PARTY RESPONDENT'S BRIEF IN OPPOSITION

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October 5, 1967

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IN THE

Supreme Court of the United States

October Term, 1967

No. 72

UNITED STATES OF AMERICA,

vs.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Defendants-Petitioners.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco., Inc.,

Non-Party Respondent.

NON-PARTY RESPONDENT'S BRIEF IN OPPOSITION

The Questions Presented

This petition presents serious questions relating to the administration of justice in federal courts. The neat, scholastic, rhetorical question presented by the petitioners offer no assistance towards the solution of these complex problems. It is conceded by both sides that there must be a judicial balancing of the equities between the parties; that the solution of the problems presented by this petition lies in the proper exercise of judicial discretion and procedural flexibility.

The important questions presented as we view them are:

(1) Does due process require that petitioners under indictment in the United States District Court for the Southern District of New York have the option of non-appearance in the Trustee's independent civil litigation pending in the United States District Court for the Eastern District of New York where they refuse to assert their privilege against self-incrimination and refuse to make any meaningful application for relief under 30(b) of the Federal Rules of Civil Procedure.

(2) Does either due process or "considerations of fairness" require that a federal district judge sitting in the motion part of the court controlling the criminal case assume to himself the power to control all other related civil actions pending in either state or federal forums.

(3) As between two federal courts, one controlling the civil litigation, the other the criminal litigation, which is in the best position to exercise the procedural flexibility and the judicial discretion necessary to strike the proper balance.

Constitutional Provisions, Statutes and Rules Involved

In addition to those enumerated by petitioners on page 2 of their brief, Rules 1, 26 and 30(b) of the Federal Rules of Civil Procedure are also involved.

Statement of the Case

The operative history leading up to this petition revolves about two separate proceedings: (1) the Trustee's civil case (Wharton v. Lybrand, et al., 65 Civ. 664) instituted in the United States District Court for the Eastern District of New York in July 1965, and (2) a subsequent

criminal case instituted approximately one and-a-half years later in the United States District Court for the Southern District of New York in October 1966. The Trustee, of course, is not a party to the criminal action. It is conceded that the Trustee has been pursuing an independent course of action and that there has been no collusion between the Trustee and the Government.

A. Public Events Leading up to the Trustee's Complaint

Continental Vending Machine Corp. ("Continental") was, until April 8, 1963, engaged in the manufacture, operation, sales and service of coin-activated vending machines.

Harold Roth ("Roth") was President, Chairman of the Board and principal stockholder of Continental from 1956 to March 1963. At that time he resigned as President and Chairman of the Board. He controlled and dominated Continental from 1956 when he acquired a controlling interest through merger. He also controlled and dominated Valley Commercial Corp. ("Valley"), a small, privately-owned corporation, ostensibly in the finance business (69-77, R 277).

Lybrand, Ross Bros. & Montgomery ("Lybrand") is a firm of certified public accountants which holds itself out to the public as being "independent" public auditors. Lybrand was retained by Roth in 1956 in connection with Roth's takeover of Continental by the merger of certain of his privately-owned companies into Continental and remained as the "independent" auditors of Continental from 1956 to approximately May 1963.

Petitioners Simon and Kaiser are partners in the Lybrand firm; petitioner Fishman is a senior employee of Lybrand. These three men were the central figures

in conducting Lybrand's "independent" audit examinations of Continental's financial statements (11, 86, R 277).

Continental is a publicly-owned corporation with over 5,000 security holders. There are two classes of securities outstanding, 4,080,701 shares of common stock, and as a result of a public offering in December of 1961, $4,719,700 principal amount of 6% convertible subordinated debentures. These securities were registered and until February 27, 1963, were traded on the American Stock Exchange, a national securities exchange (69, R 277).

Continental's financial statements related to the fiscal period ending September 30th. By certification, dated February 15, 1963, Lybrand certified to Continental's financial statements for the fiscal year ending September 30, 1962. Among other assets, the statements showed a receivable due from Valley Commercial Corporation in the approximate amount of $3.5 million. It was presented as though the receivable was fully secured and realizable in full. In fact, the receivable was worthless (R 279, R 317-320, 74-75).

During the month of February 1963 the American Stock Exchange made certain inquiries relating to Continental's condition. On February 27, 1963, as a result of these investigations, the American Stock Exchange suspended trading in Continental's securities.

On April 8, 1963, by order of the United States District Court for the Southern District of New York, based upon a complaint filed by the Securities & Exchange Commission ("SEC"), a conservator was appointed to take possession of, and operate Continental's business. The SEC charged that Harold Roth and others were despoliating Continental's assets. The SEC reported that Roth was using Valley as a conduit to syphon off millions of dollars

of Continental's money for his own use and benefit and by January 31, 1963, more than $4 million of Continental's badly needed cash had been funnelled to Roth through Valley; Valley was unable to pay Continental because Roth was unable to pay Valley. The Valley receivable as shown on Continental's financial statement was worthless. Less than two months after Lybrand had given a clean certificate to Continental's financial statement, the SEC's complaint averred:

> "Under the stewardship of the individual defendants, less than a year and a half after raising more than $5 million from the public, defendants are unable to account to the Commission, the American Stock Exchange or the investing public as to Continental's true financial picture and the disposition by Continental of the funds it received. As officers and directors, under the aegis of Roth, they have stood idly by and watched millions of dollars of securities holders' moneys flow through Valley to Roth and family for reasons for which they are unable to account. They have permitted hundreds of thousands of dollars of the amount received by Valley to be advanced in many cases without interest or security, to themselves. The books and records of Continental and Valley are so incomplete and inadequate that no proper Form 10-K can be filed until an independent audit has been made under the supervision of a receiver acting under the direction of this Court. Defendants have in their possession, custody and control money and property of Continental and Valley which they may transfer, sell, assign, pledge or otherwise waste or dissipate to the immediate and irreparable loss and damage of Continental's public security holders, unless the Court appoints a receiver of the assets of Continental and Valley." (69-78).

The Conservator was unable to prevent insolvency. An involuntary petition praying that Continental be reorgan-

ized pursuant to Chapter X of the Bankruptcy Act was filed in the Eastern District of New York and by order dated July 12, 1963, the Hon. Jacob Mishler, the United States District Court Judge for the Eastern District of New York, granted the involuntary petition and appointed the Conservator, under Judge Bonsal's order, and Irving L. Wharton as Co-trustees of Continental. Irving L. Wharton, a citizen and resident of the State of New York, is now the sole duly qualified and acting Trustee of Continental (10, 69-78).

B. The Trustee's Civil Suit

By September 1964, more than two years before the criminal indictment, the Trustee had decided to bring suit against Lybrand. The complaint was not filed at that time since, at Lybrand's request, the Trustee and Lybrand undertook negotiations to explore the possibility of settling the Trustee's claims without suit. The negotiations failed, and on July 1, 1965, the Trustee filed a civil action (65 Civ. 664) naming as defendants Lybrand, a financial institution and Harold Roth. The action against the financial institution has been withdrawn due to settlement. Harold Roth has taken the fifth amendment and Lybrand remains the only defendant subject to discovery. The petitioners are the central actors in the Lybrand engagement and are the only persons who can supply information relating to the vital areas of the Continental audit (99, 100, 182).

The Trustee's complaint alleges in essence: 1) breach of contract and warranty for each of the audit years 1958 through 1962; 2) negligence and reckless behavior on the part of Lybrand in regard to each of the audit years 1958 through 1963; and 3) conspiracy to despoil the assets of Continental and to conceal these acts through various

means, including the certification and issuance of false financial statements by Lybrand.

Immediately after the filing of the complaint, the Trustee began extensive discovery proceedings against Lybrand. By mutual agreement of counsel, it was arranged that all Lybrand worksheet papers and documents relating to the audit years in question were placed in the tax conference room at Lybrand and made available to the Trustee's attorneys and accountants. By September 1965 the Trustee began conducting depositions upon oral examinations of various members of the Lybrand firm, including the deposition of petitioner Simon. By the week of October 11, 1966, the Trustee was finishing his examination of one McDevitt, a Lybrand employee, and by mutual agreement the deposition of Kaiser was scheduled for October 21, 1966. Kaiser's appearance had been scheduled for an earlier date, but due to the pressures of Lybrand business, the Trustee's counsel agreed to a postponement (99-107).

C. The Criminal Indictment

On October 17, 1966, 15 months after the filing of the Trustee's complaint, an indictment was returned in the Southern District of New York naming Roth and petitioners Simon, Kaiser and Fishman. Among the co-conspirators named but not indicted was the Lybrand firm and McDevitt.

There are, admittedly, points of approach and contact between the issues raised by the Southern District indictment and the Trustee's civil case. Of course, in that the indictment is not concerned with events prior to 1961 and is not concerned with questions of breach of contract, breach of warranty and of negligence, it differs substantially from the complaint. There are significant areas

open for examination which have absolutely no relation to the issues raised in the criminal case.

D. Petitioners' Voluntary Disclosures to the Government

During the course of the criminal investigation, petitioners Kaiser, Simon and Fishman were represented by competent counsel. Petitioners and the Lybrand firm adopted the position that they were going to make full disclosure to the Government and to the SEC in order to stave off the threatened indictment. Accordingly, all of the Lybrand worksheet papers, including those prepared by the petitioners, were made available to the Government and the Government's accountants. More important, Kaiser, Simon and Fishman appeared before the Federal Grand Jury and testified, not once, but several times, as did other representatives of the Lybrand firm.

Petitioners, as well as Lybrand, asked permission to present accounting experts to testify before the Grand Jury; this permission was granted and outside accounting experts testified in petitioners' behalf. Counsel for petitioners joined separate counsel for the Lybrand firm in submitting to the United States Attorney's Office a detailed written memorandum which contained petitioners' factual contentions and theories in their defense in regard to the criminal charges. Thus, petitioners, as well as the Lybrand firm, voluntarily gave to the Government the widest latitude of discovery (R 62-65, 102-103).

E. The Kaiser Deposition

Soon after the criminal indictment was filed, counsel for petitioners and counsel for Lybrand took the position that the depositions in the Eastern District civil action should be stayed. However, only Kaiser moved in the United States

District Court for the Eastern District of New York before Judge Mishler for a vacatur of his scheduled deposition under Rule 30(b) of the Federal Rules of Civil Procedure. His motion was based on very restrictive grounds: that his mere appearance at the depositions, in light of the criminal indictment, would be oppressive and violative of his constitutional rights. Kaiser's counsel refused to state to the Court whether or not Kaiser intended to invoke any constitutional privilege at his examination. Judge Mishler ruled that there was nothing oppressive about Kaiser's mere appearance at his scheduled examination and that assertion of constitutional rights on a motion to vacate was premature. Accordingly, Kaiser was ordered to appear for examination, but was free to assert at the examination any constitutional privilege he might think appropriate (104-105, 179).

Kaiser appealed, but that appeal was dismissed summarily on October 16, 1966, obviously because it was premature—nothing of significance had yet occurred in the Court below. The Court of Appeals remanded matters back for further proceedings in the District Court (104-105).

On October 26, 1966, Kaiser appeared at his scheduled deposition at the United States District Court for the Eastern District of New York. Kaiser waived his fifth amendment privilege and chose to testify for the remainder of that day. On October 31, 1966, Kaiser again appeared at his scheduled examination, waived his privilege under the fifth amendment and testified during that day. Further deposition dates were fixed for November 2 and November 4, 1966. Never once did Kaiser assert his fifth amendment privilege to avoid the lawful process of the Eastern District Court either under the due process or self-incrimination clauses (R 4-17).

On October 27, 1966, petitioners added to the already impressive array of legal talent representing them. They switched forums and moved in the criminal motion part in the Southern District of New York for an order enjoining the civil case against Lybrand until the completion of the criminal case, on the grounds that the continued depositions would provide evidence to the Government, otherwise unavailable to it, and that the depositions would be burdensome (104).

F. Conflicting Orders Between Eastern and Southern Districts of New York

On November 1, 1966, Judge Bryan heard oral argument on the application and papers were submitted to him. He held no hearings. Approximately 37 days passed and nothing was heard from Judge Bryan. During that time Judge Mishler became concerned with what he considered to be an interference with the legitimate jurisdictional exercise of the Eastern District. He was concerned that the delay was affecting the moving of the civil case for trial; the prompt determination of the rights of creditors; and was unduly interfering with the plan of reorganization and the winding up of Continental's affairs, now more than three and-a-half years old. Accordingly, he issued an order on December 5, 1966 in furtherance of his original order of October 24, 1966 directing that the examination of Kaiser go forward despite the temporary stay, now more than 20 days old, issued from the Southern District of New York, which assumed to the Southern District the power to stay the Eastern District process. Both sides found themselves on the horns of a dilemma with the Eastern District ordering them to proceed and the Southern District ordering a stay. Kaiser then moved before the Court of Appeals for a temporary stay of Judge Mishler's

direction of December 5, 1966. The Court of Appeals granted a temporary stay in order to give Judge Byran a chance to render his decision. Several days later, Judge Bryan issued the instant opinion which enjoined the Trustee from examining Kaiser, Fishman and Simon.

G. Judge Byran's Injunction Order and Court of Appeals Reversal Thereof

Judge Bryan's opinion holds that "civilized standards of procedure and evidence" require that a person under indictment be given the option of non-appearance in any related civil case outstanding in any federal or state court. Moreover, this option need not be asserted in the forum that controls the civil litigation. Judge Bryan assumed to himself "sitting in the criminal motion part" a supervisory power over the process of every other federal or state court. Accordingly, he stayed the legitimate process of the Eastern District of New York without requiring petitioners to make a meaningful application before that Court. He originated his vast display of power despite the fact that petitioners had adequate remedies under either the fifth amendment or a motion under 30(b) of the Federal Rules of Civil Procedure. Judge Bryan's opinion is not justified by precedent or by necessity.

Every case relied on by Judge Bryan, indeed every reported case on this subject, are cases that were brought under Rule 30(b) of the Federal Rules of Civil Procedure before the district court or judge controlling the civil case. They all stand for the proposition that the district court controlling the civil case has a discretionary power to stay its proceedings under Rule 30(b) of the Federal Rules of Civil Procedure if the movant can show that the

civil case is being used as a "dodge" to subvert the criminal case or to avoid the protections of the fifth amendment. And absent the ability to make such a showing, a witness in a civil proceedings can avoid testifying in those proceedings only by invoking his rights under the self-incrimination clause of the fifth amendment.

The Court of Appeals reversed Judge Bryan because it was conceded that the Trustee's civil case was an independent proceeding brought long before the criminal case and in furtherance of the legitimate interests of literally thousands of security holders and creditors; that "the Trustee requires" the petitioners' "deposition testimony to complete his preparation for the trial of the Eastern District action, which must be received before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed"; it is conceded that the Trustee seeks in "good faith" to depose the appellees for that purpose alone, and there has been no consultation between the Trustee and the Government in regards to the conduct of the Trustee's civil case. The Court of Appeals assumed that Judge Bryan had the power to act, but reversed Judge Bryan because they recognized that there is nothing about the Trustee's civil case that is "unfair" or threatens the integrity of the criminal case.

The Court of Appeals was also led to reverse Judge Bryan's order by the:

> "... consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to

depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here." (184-185).

Summary of Argument

It is conceded that the Trustee's civil lawsuit is independent and unconnected with the criminal case; that it is affected with a public interest and is not in any way a ruse designed to subvert the petitioners' rights in the criminal case pending in the Southern District of New York. Petitioners' testimony in the Trustee's civil case is completely voluntary and results from a wilfull refusal on their part to avail themselves of their rights under the fifth amendment and under F.R. Civ. P. 30(b). The full measure of a witness' ability to avoid testimony in a civil case is to invoke the fifth amendment or to make a motion addressed to the discretion of the court in control of the civil process. The orderly administration of federal justice requires this. A judge sitting in the motion part of a court controlling a criminal prosecution has no right to issue what is tantamount to a writ of prohibition over a court of co-equal power which has complete jurisdiction of the civil case.

POINT I

The Trustee's pretrial examination is bona fide and proper. Petitioners can avoid testifying in the civil action only by moving that Court's discretion under F.R. Civ. P. 30(b) or by assertion of their fifth amendment privilege.

Rule 26(b) of the Federal Rules of Civil Procedure provides in part:

> "Unless otherwise ordered by the Court . . . the deponent may be examined regarding any matter *not privileged* which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the examining party, . . ." [Emphasis added].

Rule 30(b) of the Federal Rules of Civil Procedure provides in part:

> "Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court *in which the action is pending* may make an order that the deposition shall not be taken, . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." [Emphasis added].

These Rules, together with Rule 1 of the Federal Rules of Civil Procedure, express a strong policy in the law, that a civil litigant may examine his adversary in advance of trial, on relevant, unprivileged matters, absent a showing that the examination is being conducted in bad faith and in such a manner as unreasonably to annoy, embarrass

or oppress the person being examined. *Russo* v. *Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957). The Trustee's discovery proceedings in this civil case, brought over two years before the Southern District indictment, and without any reference to it, are being conducted in good faith, and not to annoy, embarrass or oppress any of the persons being examined.

Hiss v. *Chambers*, 8 F.R.D. 480 (N.D. Ohio, 1948), is the only case precisely in point. There, as here, a civil action was commenced long before the criminal case and without reference to it in the Northern District of Ohio. There, as here, a subsequent criminal indictment was returned in the Southern District of New York. The Government sought to stay the civil action and particularly the examination of Chambers, the Government's chief witness in the criminal trial. The Government did not move in the Southern District of New York where the criminal action was pending under a vague concept of inherent equity power, but moved the District Court in Ohio to stay the civil proceedings under Rule 30(b) of the Federal Rules of Civil Procedure on the ground that the criminal action was pending in the Southern District of New York. The Ohio District Court, exercising its discretion under Rule 30(b), denied the motion, saying (at pages 481, 482):

> "More specifically, the grounds for the objection were (a) that the Federal Rules of Criminal Procedure, 18 U.S.C.A., which would be applicable to the trial of the criminal case make no provision for pre-trial examination of a prospective witness in the case and (b) that the continuation of the pre-trial deposition of Chambers (who is expected to be an important witness for the United States in the criminal case) in this civil case would in effect afford the defendant in the criminal case a possible advantage otherwise unavailable except for the pendency of the civil case, and to be used as

a possible basis for cross-examination of Chambers as a witness in the criminal case.

* * * * * *

"I have carefully considered these objections, but do not find that they constitute from the standpoint of public interest a sufficient reason for denying the plaintiff in the civil case instituted long before the criminal case, exercise of the procedural right afforded by Rule 26 of the Federal Rules of Civil Procedure; . . ."

Judge Bryan's opinion is bottomed on three concepts: (1) that Trustee's proper discovery proceedings under Rule 26(b) of the Federal Rules of Civil Procedures are, *per se*, unfair; (2) that the defendants can avoid testifying in that proceeding even where they "eschew" their fifth amendment privilege; and (3) that the criminal court has the inherent power to stay the discovery proceedings in the civil case.

To support the proposition that legitimate discovery proceedings, untainted by wrongful conduct, are unfair *per se*, he relies on the following cases:

Campbell v. *Eastland*, 307 F. 2d 478 (5 Cir. 1962), cert. den., 371 U.S. 955 (1963);
United States v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964);
United States v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964);
United States v. *Maine Lobstermen's Association*, 22 F.R.D. 199 (D. Maine 1958);
United States v. *Linen Supply Institute of Greater New York*, 18 F.R.D. 452 (S.D.N.Y. 1955);
United States v. *Bridges*, 86 F. Supp. 931 (N.D. Calif. 1949);
United States v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947);
Zara Contracting Co. v. *New York*, 256 N.Y.S. 2d 98 (3d Dept. 1965);

United States v. *One 1964 Cadillac Coupe*, 65 Ad. 762 (S.D.N.Y. 1966);
United States v. *One 1963 Chevrolet Sedan*, Misc. No. 63-M-1239 (E.D.N.Y. 1963);
Perry v. *McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964);
Paul Harrigan & Sons, Inc. v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953);
National Discount Corp. v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952)."

To support his theory that the defendants can avoid testifying on other than fifth amendment grounds, he relies principally on *Paul Harrigan & Sons, supra, Perry* v. *McGuire, supra*, and *National Discount Corp.* v. *Holzbaugh, supra.*

These cases do not support either one of Judge Bryan's propositions. All of the cases cited under *Campbell* v. *Eastland, supra,* are cases brought under Fed. R. Civ. P. 30(b) before the district court in which the civil cases were pending. They all stand for the proposition that the district court controlling the civil case has a discretionary power to stay its own process under Rule 30(b) of the Federal Rules of Civil Procedure where the movant can show that the civil case is being used as a "dodge" to subvert the criminal case, or to avoid the protections of the fifth amendment. *Campbell* v. *Eastland, supra.* In not a single case was the civil action stayed by the district court in which the criminal case was pending. These cases therefore do not support the proposition that the civil case should be stayed where there is no showing that it is being used as a "dodge" to subvert the criminal case or to avoid the protections of the fifth amendment. And they certainly offer no support for the proposition that the criminal court can stay the civil court.

A careful reading of *Perry* v. *McGuire, supra, Paul Harrigan & Sons, Inc., supra, National Discount Corp.* v.

Holzbaugh, supra, shows that the application was made before the judge or court controlling the civil case and that the court exercised its discretion under F.R. Civ. P. 30(b) on the basis of fifth amendment considerations.

> "... it seems clear that to require defendant Blumner to respond to over 100 interrogatories at this time would be oppressive *and would infringe on his constitutional rights.* See Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed. 2d 502 (1963); United States v. Maine Lobstermen's, Ass'n, 22 F.R.D. 199 (D. Me. 1958); United States v. Linen Supply Institute, 18 F.R.D. 452 (S.D. N.Y. 1955); Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953); United States v. Bridges, 86 F.Supp. 931 (N.D. Calif. 1949); Annot., 70 A.L.R.2d 685 (1960)." *Perry* v. *McGuire, supra* at 273 [Emphasis added].

In the *Harrigan* case, *supra,* the motion under F.R. Civ. P. 30(b) was granted on grounds of the fifth amendment privilege.

> "Several individual defendants, while filing what are entitled 'Answers to Interrogatories', have, in effect, given no information but *by their answers have invoked the protection of the Fifth Amendment.* (p. 334).
>
> "... I am of the opinion that the information sought to be elicited by the plaintiff in these interrogatories may well provide proof to the Government from which it may establish the criminal charges against the indicted defendants. To compel discovery under such circumstances would contravene rights guaranteed by the Fifth Amendment to the individual defendants. The objections to the interrogatories are, therefore, well founded and will be sustained. The answers to the interrogatories *invoking the protection of the Fifth Amendment* are adequate and proper for the same reason." (p. 335) [Emphasis added].

Similarly, *National Discount Corp., supra* at 237, turned on the fifth amendment. There, Althouse, the defendant in the civil action, was being deposed. Word came to the attention of counsel that an indictment had been handed down against Althouse arising out of substantially the same facts as involved in the civil suit.

> "... whereupon counsel for Althouse objected to continuing the said deposition upon the ground that to continue answering questions relating to the subject matter of the issue framed by the pleadings of the within cause *might tend to incriminate the said Robert Althouse as a defendant named in the indictment, ...*" [Emphasis added].

Absent the ability to move under F.R. Civ. P. 30(b) in the civil case, the defendants can avoid giving testimony in the civil case *only* by asserting their rights under the fifth amendment. The entire controversy here is of fifth amendment dimensions.

In attempting to avoid the fifth amendment problem, Judge Bryan makes much of a mutuality of discovery doctrine and points out that the civil and criminal rules are different in scope and purpose. Proper analysis shows that this argument is still a fifth amendment question. What is the evil to be prevented here? The defendants fear that their voluntarily given depositions in the civil case can be used by the Government against them on the criminal trial. No matter how artfully articulated, this assertion remains a fifth amendment proposition and the only way the defendants can avoid it is by asserting their rights under that amendment.

It is true that the Government is restricted in its discovery activity against the defendants under the Federal Rules of Criminal Procedure. But those Rules are directed

against governmental activity and they are not meant to limit or prejudice the Trustee. Compare *McNabb* v. *United States,* 318 U.S. 332, 340 (1943) with *U. S.* v. *Masterson,* 251 F. Supp. 937 (S.D.N.Y. 1966). Moreover, the Federal Rules of Criminal Procedure do not restrict discovery by the Government on the basis of vague concepts of unfairness or "sportive" theories of litigation; they restrict governmental discovery in light of the fifth amendment. The Trustee, too, is limited by the fifth amendment in obtaining discovery in the civil case. Where the privilege is properly asserted, the broad discovery of the civil rules gives way to the privilege. F.R. Civ. Proc. 26. The indicted person has only one right to remain mute and that is his fifth amendment right. He does not enjoy, as Judge Bryan holds, two rights, one stemming from the fifth amendment and another from vague concepts of "fairness" or from "mutuality" between the civil and criminal rules of discovery.

Indeed, the recent revision of Rule 16 of the Federal Rules of Criminal Procedure, which expanded the Government's right to obtain discovery from a defendant, provoked Mr. Justice Douglas to comment as to its validity in light of the fifth amendment:

> "The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. . . . I mean to imply no views on the point, except to note that a serious constitutional question lurks here." *Mr. Justice Douglas' Statement,* 39 F.R.D. 277 (1966).

This is not based upon mutuality, *i.e.,* measured by the defendant's ability to discover the Government's case.

> "The prosecution's opportunity to discover evidence in the possession of the defense . . . is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation . . . [of the fifth amendment] . . . if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, e.g. *Sherbert* v. *Verner*, 374 U.S. 398. . . . To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. . . ."
>
> "The proposed addition of Rule 17.1 also suggests difficulties, perhaps of constitutional dimension. . . ." (id at *277, 278*).

Thus, it is obvious that the Federal Rules of Criminal Procedure regulating the Government's ability to discover evidence have been fashioned from the restrictions imposed by the fifth amendment and not, as Judge Bryan suggests, from so-called concepts of unfairness. If governmental discovery in criminal cases is called unfair it is because it abrogates or denies a defendant's rights under that amendment. A person accused of crime has but one basic right to stand mute and that is the one afforded him under the Fifth Amendment to the Constitution. Accordingly, if the appellees wish to stand mute in the civil case, absent a successful motion in the civil case under F.R. Civ. P. 30(b), they can do so only by invoking the fifth amendment and not by invoking vague concepts of unfairness before a tribunal that has no power over the process in the civil case.

Indeed, if considerations of "fairness" are evaluated, they compel the conclusion that, absent assertion of the fifth amendment privilege and absent the ability to move the Civil Court to stay or limit its own process, the civil case should be allowed to go forward. Unlike any other case cited, the plaintiff is a fiduciary officer charged with a court appointed trust and that trust itself is affected with a public interest. The rights of thousands of innocent creditors and stockholders are at stake; the prompt conclusion of the bankruptcy proceeding is a matter of legitimate public interest. Judge Bryan found that the Trustee's discovery activities were not collusive nor were in any sense a ruse to achieve an illicit purpose, nor a circumvention of rights protected by the fifth amendment. The Trustee's activities are, and always have been, conducted for the Trustee's proper purposes in lawful pursuit of the objectives of his civil case.

Moreover, Simon, Kaiser and Fishman have appeared on several occasions before the Grand Jury that indicted them and responded to questions without invoking the fifth amendment. They sought and received the opportunity to present accounting experts before the Grand Jury and submitted to the Government lengthy opinions in support of their position. From the start of the criminal investigation, the individual defendants and the Lybrand firm adopted a policy of disclosure to the Government. It is ironical, therefore, that the only person who so far has been prevented from discovering the facts in this case is the Trustee.

Judge Bryan seeks to excuse petitioners from the requirement of asserting their privilege against self-incrimination by suggesting that such assertion would end the professional careers of petitioners. This claim by petitioners is seductive; it is not supported by a scintilla of

evidence in the record below. Petitioners have been unable to cite any rule, law, canon of professional ethic or State licensing requirement which indicates that a certified public accountant must lose his professional standing upon assertion of the privilege. We can find none; and if there were one, this Court's recent opinion in *Spevack* v. *Klein*, 87 S.Ct. 625 (1967), would render it inoperative. Moreover, petitioners are career men in the Lybrand organization. Lybrand has publicly announced in the press that the firm "vigorously supports" petitioners in their defense of the criminal case. Lybrand has provided them with counsel; Lybrand obviously approved of petitioners' original application before Judge Bryan which sought to seal the lips of all Lybrand personnel; and it is equally obvious that Lybrand supports petitioners' present application. The idea that Lybrand would continue its support if petitioners seek to remain mute on a claim based on the due process clause of the fifth amendment, but would abandon them in punishment if they were to remain mute on a claim based on the self-incrimination clause of the fifth amendment, is stretching credulity to the breaking point.

POINT II

The orderly administration of federal justice requires that under the circumstances here present, applications to stay or modify civil process should be made before a judge or court controlling the civil case.

The facts in the instant application adequately testify to the confusion and embarrassment caused by petitioners' unwillingness to avail themselves of the plain and adequate remedies existing in the civil case. We were subject to the spectacle of injunction and counter-injunction between federal courts of equal jurisdiction. Chief Judge Lombard, speaking for the majority of the court of appeals quite correctly resolved the serious administrative problem:

> "We are also led to reverse Judge Bryan's order by the consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here." (184-185).

As we have already pointed out, every reported decision related to the point at issue teaches that applications for a stay of a civil suit until the disposition of a criminal prosecution on related matters ought to be made before

the judge or court controlling the civil process. Judge Bryan's actions stand alone and, as the court of appeals pointed out:

> ". . . No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, ..."

Nor do considerations of logic supply the authority which precedents fail to do. Both Judge Mishler and Judge Bryan are federal judges. Both are equally committed to preserve the rights of defendants accused of crime. No especial hierarchy exists as a result of the fact that a federal judge happens to be sitting in the motion part of a court controlling a criminal prosecution.

On the other hand, both precedents and logic demand that applications such as the petitioners make here ought to be made before the judge or court controlling the civil process. We agree with petitioners that *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), together with every other reported case on the subject sets forth the working guidelines to be used by federal courts in the solution of the complex problems which are raised when there are points of approach and contact between criminal and civil litigation.

The *Campbell* case rested on facts significantly different from the instant application. In that case, prospective defendants in a criminal tax prosecution commenced a civil action for a tax refund. The facts underlying the claim for refund were known to the plaintiffs. The Court found that the civil suit was commenced as a "dodge" in order to enable the plaintiffs to discover from the government statements and reports protected under Title 18 U.S.C. § 3500, and "to be honest about it, the motion for discovery

(if not the suit for refund) was for the purpose of obtaining otherwise unobtainable reports." 307 F.2d 478, 490. The entire proceedings were brought before the judge in charge of the civil case. He granted discovery of the § 3500 reports. It was in that context that the Fifth Circuit set down the governing principles approved of by petitioners and set forth, in part, on pages 15 and 16 of their brief:

> "In handling motions for a stay of civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive . . . Separate policies and objectives support these different rules.
>
> ". . . 18 U.S.C.A. § 3500 does away with any pretrial discovery of statements of a government witness. A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. In some situations it may be appropriate to stay the civil proceeding. United States v. Bridges, N.D. Calif., 1949, 86 F.Supp. 931. In others it may be preferable for the civil suit to proceed—unstayed. In the proper case the trial judge should use his discretion to narrow the range of discovery. Here, however, the trial judge seemed to think that he had no discretion—once discovery was moved for in a civil suit." 307 F2d 478, 487.

It is significant that the Fifth Circuit placed the burden of "judicial discretion and procedural flexibility" in the hands of the judge in control of the civil case. Even in such a patent situation as presented by the *Campbell* case, the Fifth Circuit did not suggest that judicial discretion should prohibit the plaintiff from all discovery:

> "Limited discovery and other remedies were available which would not be vulnerable to improper inspection. Thus, the plaintiffs were clearly entitled to discovery of any documents obtained from the plaintiffs' files. By interrogatories under Rule 33, the plaintiffs could learn the names and addresses of persons having knowledge of relevant facts. By depositions under Rule 26, they could ascertain relevant facts known to the agents. . . ." 307 F2d 478, 488.

If anyone failed to use "judicial discretion and procedural flexibility" in relation to the instant case, it was Judge Bryan. He cut off all discovery of petitioners by the Trustee. Only Judge Mishler, sitting as the Rule 2 Judge in control of the civil case in the Eastern District of New York, could exercise that "judicial discretion and procedural flexibility" called for by this situation. Under Rule 30(b) of the Federal Rules of Civil Procedure petitioners could have moved, and still can move, for an order impounding their depositions. This, of course, would have completely eliminated petitioners' claimed prejudice. Petitioners' counsel admitted on oral argument before the Court of Appeals that such an order would effectively protect petitioners. Only Judge Mishler could have employed the "limited discovery" provisions called for by *Campbell* v. *Eastland, supra.* As we have pointed out, petitioners have made substantial voluntary disclosure to the Government. They are in possession of their Grand Jury testimony. It is conceded that dis-

covery by the Trustee to the same extent as the information already voluntarily given to the Government could not in any manner prejudice petitioners.

POINT III

No proper basis for the issuance of this injunction exists either in the All Writs Statute, the inherent equity jurisdiction of the District Court, or the District Court's supervisory powers over the administration of criminal justice.

Judge Bryan's actions stand alone, unsupported by precedent. The court of appeals in their reversal, did not directly tackle the question of power, because it was obvious to them that even if he had this unusual power he should not have used it under the circumstances here present:

> "Both holdings present questions of first impression. No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, either under the All Writs Act, compare *Steelman* v. *All Continent Corp.*, 301 U. S. 278 (1937) (injunction restraining action against trustee in bankruptcy), or under the supervisory [fol. 586] power, which the Supreme Court has implemented by formulating rules for the conduct of criminal trials, e.g., *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *McNabb* v. *United States*, *supra*, or by enjoining the commission of acts by "federal law enforcement agencies." *Rea* v. *United States*, 350 U. S. 214, 217 (1956). We assume without deciding that the lower court had power to issue such an injunction, but we hold that it should not have done so, as there is no showing that the depositions sought by the trustee would interfere with the trial of the indictment or the appellees' preparation of their defense."

Judge Bryan conceives his power to enjoin the Trustee as being founded on either one or all of the following: the All Writs Statute (28 U.S. Code §1651); the inherent equity jurisdiction of the Federal Courts; or the supervisory power of the district court over the administration of criminal justice either under the rules or generally. None of these supposed sources of power forms a proper basis for the issuance of what is tantamount to a Writ of Prohibition against a sister Federal Court.

a. Inherent Equity Jurisdiction

To the extent that the District Court for the Southern District of New York possesses inherent equity jurisdiction to issue injunctions, that jurisdiction is limited by the availability to defendants of adequate alternative remedies.

Judge Bryan's opinion contains no authority to support his view that he, sitting in the criminal motion part in the Southern District of New York, had "an inherent equity jurisdiction" sufficient to justify his stay of the Eastern District's civil proceedings. The two cases cited in a footnote: *Rudnicki* v. *McCormack, et al,* 210 F. Supp. 905 (D.R.I. 1962); *Landis* v. *North American Co.,* 299 U.S. 248 (1936), not only fail to support this position but, indeed, explain the error of his position. In the *Landis* case, *supra,* multiple suits were brought in various district courts throughout the United States. A Government agency was involved. A majority of the litigants agreed that the suit should be prosecuted in a Federal Court in the Southern District of New York as a test case. Litigants who had brought suit in the District of Columbia refused to agree to this proposition. It is important to note that the government agency did not ask the Southern District of New York to enjoin the progress of the case in the

District of Columbia. Instead it asked the District of Columbia to stay its own proceedings. This it did.

The Supreme Court, in talking about that injunctive power, said:

> ". . . [T]he power to stay proceedings is incidental to the power inherent in every court to control disposition of the causes on *its* docket . . ." [Emphasis added] *Landis, supra,* p. 166

Not only does the *Landis* case fail to support the concept that Judge Bryan, sitting in the criminal motion part in the Southern District of New York, has some inherent criminal equity jurisdiction sufficient to interfere with the legitimate jurisdictional exercise of a sister court, but it reaffirms the contention that the Rule 30(b) cases stand for the proposition that the civil courts have the power to stay *their own* proceedings either by the discretion granted to them by that Rule or under "the power inherent in every court to control the disposition of the causes on its docket." It reaffirms that the defendants here had only two means with which to void the valid Eastern District process which sought their discovery—their assertion of the fifth amendment or a motion in the civil case under Rule 30(b).

Rudnicki, supra, is a most unusual case. It probably has no precedential value to support Judge Bryan. That case was concerned with a litigant who brought vexatious suits against the Judges of the United States District Court in Boston and many public officials. After dismissing multiple complaints on the grounds that they failed to state causes of actions, the District Court Judge sitting by designation then enjoined Rudnicki from reinstituting these vexatious suits against the entire bench of the Boston

Court and, incidentally, himself. The court said, at pp. 909, 910:

> "I have little question, under the circumstances disclosed, as to my power, whether under the All Writs Act, or in the exercise of my inherent equity jurisdiction, or in the exercise of my power to supervise the orderly administration of *this* court, to direct that an injunction issue.
>
> • • • • •
>
> ". . . Thus it has long been settled that a court of equity may enjoin the institution of repetitious and baseless litigation. The ancient bill of peace had this as one of its purposes. . . .
>
> • • • • •
>
> ". . . The action which I propose to take also finds support in a line of cases in this Commonwealth which assert the power of a court, not only to protect an individual litigant from harassment, *but to protect its own records* from irrelevant, unimportant and superfluous papers." [Emphasis added].

In short, *Rudnicki* held, as *Landis* did, only that a court has power to control its own business. It further supports the Trustee's contention that any efforts to control the proceedings in the Eastern District must be made in that District. Under no stretch of the imagination can these cases support Judge Bryan's view that he can interfere with the lawful exercise of the Eastern District's jurisdiction.

b. The All Writs Statute

Injunctive relief under the All Writs Statute (28 U.S. Code § 1651) is, of course, equitable in nature, and Judge Bryan's proper utilization of that statute is limited by the existence of the adequate remedies at law discussed in POINT II of this brief. The utilization of the All Writs Statute is, however, inappropriate in this case for a second and perhaps more important reason. Historically, the All

Writs Statute has been used to prevent Federal Courts from being ousted from their jurisdiction to dispose of the *res* or subject matter before them. The very cases relied on in the opinion below demonstrate this.

In *Steelman* v. *All Continent Corporation*, 301 U.S. 278, 57 S.Ct. 705 (1937), a district court had jurisdiction of a bankruptcy matter properly before it. That court granted an injunction enjoining a corporation (a tool of the bankrupt himself) from prosecuting a suit in another district which sought to determine title to certain stocks and bonds. The stocks and bonds were the assets of the bankrupt. The injunction was issued to prevent the bankrupt from rendering nugatory any judgment that the district court before whom the bankruptcy proceedings were instituted might make regarding the title to those securities.

In *Havner* v. *Hegnes*, 269 Fed. 537 (8 Cir. 1920), the district court entertained an application to appoint a receiver for a publicly-listed corporation at the behest of a defrauded stockholder. After jurisdiction attached, a State Court appointed a receiver for the same corporation. The Federal Court enjoined the State Court receiver from disposing of the assets of the defunct concern. Obviously, if the assets of the corporation were disposed of, the court would have no meaningful *res* upon which to act; therefore the district court was protecting itself from ouster of meaningful jurisdiction and preserving its power to dispose of the assets of the insolvent corporation.

The teaching of these § 1651 cases is merely that a court, after jurisdiction of a matter legitimately attaches, may protect itself against ouster of its jurisdiction. This principle has no application here. The Eastern District proceedings in no way interfere with the Southern District's jurisdiction to hear and fully determine every issue raised by

the criminal indictment, including the Government's use, if any, of the deposition testimony.

In *Bullock* v. *United States*, 265 F.2d 683 (6 Cir.), cert. den. 360 U.S. 909 (1959), a Federal District Court issued an injunction to prevent continued violations of that court's prior order of school integration. Thus, the injunction was born of the inherent power of the Federal District Court to prevent the frustration of the execution of its valid and subsisting orders. Patently, this is not the case here. The prosecution of the civil case in the Eastern District in no way conflicts with any outstanding order of the District Court for the Southern District of New York.

Judge Bryan's conclusion that the All Writs Statute empowers a judge sitting in the Southern District in the criminal motion part to enjoin the legitimate exercise of a sister Federal Court's exclusive jurisdiction is unsupported by any of the cases that he cites. Moreover, none of the cases he cites deals with criminal matters. The discovery proceedings in the Eastern District or, for that matter, the trial of the civil action in the Eastern District, do not threaten the jurisdiction of the Southern District to hear and determine every aspect of the criminal case, nor do they frustrate any outstanding order issued by the Southern District. Ironically, it is the Eastern District's jurisdiction which is being threatened by the Southern District's order and if § 1651 relief is appropriate at all in this instance it is appropriate to the Eastern District Court to protect its legitimate jurisdiction.

In *Haynes* v. *Hegnes, supra,* the court relied on *Peck* v. *Jenness*, 7 How. 612, 12 L. Ed. 841 (1849) and dramatically pointed out the enormous danger inherent in what Judge Bryan has done here:

> "It is a doctrine of law, too long established to require a citation of authorities, that, where a court has

jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court, and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.'"

c. Supervisory Powers Over the Administration of Criminal Justice

Perhaps the most significant and far-reaching aspect of Judge Bryan's decision is his concept of his supervisory power over the administration of criminal justice. He has cited no case, and indeed, none could be found, where this supervisory power has been given such limitless scope. If his concepts of power are accepted by this Court, the Federal District Courts will be plunged into the executive business of investigating crime. They will be plagued by conduct alleged to be "unfair" and asked to give advisory opinions relating to items of evidence and of conduct. Certainly, Rule 2 of the Federal Rules of Criminal Procedure which is to be construed to secure fairness in the administration of those rules does not support such a concept. Nor do the cases upon which he relies.

Rea v. *United States*, 350 U.S. 214, 76 S.Ct. 292 (1956);

McNabb v. *United States*, 318 U.S. 332, 63 S.Ct. 608 (1943);
Go-Bart Importing Co. v. *United States*, 282 U.S. 344, 51 S.Ct. 153 (1931);
In re No. 32 East Sixty-Seventh Street, 96 F.2d 153 (2 Cir. 1938);
Wise v. *Henkel*, 220 U.S. 556, 31 S.Ct. 599 (1911).

In *McNabb, supra*, the issue was whether or not an item of evidence, namely, a confession, should have been admitted in a federal criminal prosecution. A federal agent violated a specific federal rule of criminal procedure, namely, Rule 5(a), by failing to arraign the prisoner within a reasonable time. The federal agent was charged with the responsibility of upholding the law and his conduct was bound by that specific rule of criminal procedure. The court ruled, with its now famous logic, that neither the agent nor the government could profit by its own wrong, and, as a disciplinary measure, held the confession to be inadmissible. Similarly, in *Rea, supra*, a federal agent, sworn to obey the Constitution, violated the defendant's constitutional rights by an illegal search and seizure. The evidence was suppressed in a federal proceeding and the agent, quite callously, was prepared to turn over the illegally seized evidence for state court prosecution. At that time, of course, illegally-seized evidence was admissible in state court prosecutions. The court enjoined the agent, largely as a disciplinary measure, and under the reasoning of *McNabb, supra*, held it was unconscionable conduct on the part of the government agent.

Go-Bart, supra, is not at all applicable. It is no different from a motion to suppress under Rule 41(e) of the Federal Rules of Criminal Procedure and emphasizes only the procedures employed prior to the adoption of Rule 41(e).

In *Wise, supra,* the United States Attorney, a party to the action, refused to obey a valid subsisting order of the Federal Court and was committed for it.

In the instant case, the Trustee's actions are not governmental actions, nor are they illicit in that they violate any Federal Rule of Criminal Procedure, or (like the agent in *Rea, supra*), the Constitution of the United States. A Federal judge, sitting in the criminal motion part of another court, has no disciplinary powers over a civil litigant who is performing his duties honorably and reasonably. No one can deny that the Trustee's discovery procedures are a legitimate and honest exercise of his rights and the depositions are, in the Trustee's hands, proper in every respect. There is, therefore, no cause or reason for Judge Bryan to originate and use a vast power to discipline a civil litigant whose behavior is beyond reproach.

CONCLUSION

The injunction below was issued without proper basis and in the face of adequate alternative remedies. The taking of the defendants' depositions in the civil case is fair in the circumstances. The Court of Appeals reversal to Judge Bryan's injunction which interfered with a matter exclusively within the jurisdiction of the Eastern District should be affirmed.

Respectfully submitted,

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October 5, 1967.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Docket No. ~~1165~~ 92

APR 19 1967
JOHN F. DAVIS, CLERK

UNITED STATES OF AMERICA,

vs.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Defendants-Petitioners,

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco., Inc.,

Non-Party Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Docket No. 1185

UNITED STATES OF AMERICA,

vs.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,
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Non-Party Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Questions Presented

This application presents the following questions:

1) Should this Court grant piecemeal appeal to review the proceedings below when those proceedings amount to no more than petitioners' unsuccessful attempt to suppress the Government's use of evidence upon petitioners' forthcoming criminal trial.

2) Does due process require that petitioners under indictment in the United States District Court for the Southern District of New York have the option of non-appearance in the Trustee's independent civil litigation pending in the United States District Court for the Eastern District of New York where they refuse to assert their privilege against self-incrimination and refuse to make any meaningful motion under 30(b) of the Federal Rules of Civil Procedure.

Statement of Facts

A. Public Events Leading Up to Trustee's Complaint

Continental Vending Machine Corp. ("Continental") was, until April 8, 1963, engaged in the manufacture, operation, sales and service of coin-activated vending machines.

Harold Roth ("Roth") was President, Chairman of the Board and principal stockholder of Continental from 1956 to March 1963. At that time he resigned as President and Chairman of the Board. He controlled and dominated Continental from 1956 when he acquired a controlling interest through merger. He also controlled and dominated Valley Commercial Corp. ("Valley"), a small, privately-owned corporation, ostensibly in the finance business (96a-97a, R 277).

Lybrand, Ross Bros. & Montgomery ("Lybrand") is a firm of certified public accountants which holds itself out to the public as being "independent" public auditors. Lybrand was retained by Roth in 1956 in connection with Roth's takeover of Continental by the merger of certain of his privately-owned companies into Continental and remained as the "independent" auditors of Continental from 1956 to approximately May 1963 (11a, R 277).

Petitioners Simon and Kaiser are partners in the Lybrand firm; petitioner Fishman is a senior employee of Lybrand. These three men were the central figures in conducting Lybrand's "independent" audit examinations of Continental's financial statements.

Continental is a publicly-owned corporation with over 5,000 security holders. There are two classes of securi-

ties outstanding, 4,080,701 shares of common stock, and as a result of a public offering in December of 1961, $4,719,700 principal amount of 6% convertible subordinated debentures. These securities were registered and until February 27, 1963, were traded on the American Stock Exchange, a national securities exchange (96a, R 277).

Continental's financial statements related to the fiscal period ending September 30th. By certification, dated February 15, 1963, Lybrand certified to Continental's financial statements for the fiscal year ending September 30, 1962. Among other assets, the statements showed a receivable due from Valley Commerical Corporation in the approximate amount of $3.5 million. It was presented as though the receivable was fully secured and realizable in full. In fact, the receivable was worthless (R 279, R 317-320, 100a).

During the month of February 1963 the American Stock Exchange made certain inquiries relating to Continental's condition. On February 27, 1963, as a result of these investigations, the American Stock Exchange suspended trading in Continental's securities (102a).

On April 8, 1963, by order of the United States District Court for the Southern District of New York, based upon a complaint filed by the Securities & Exchange Commission ("SEC"), a conservator was appointed to take possession of, and operate, Continental's business. The SEC charged that Harold Roth and others were despoliating Continental's assets. The SEC reported that Roth was using Valley as a conduit to syphon off millions of dollars of Continental's money for his own use and benefit and by January 31, 1963, more than $4 million of Continental's badly needed cash had been funnelled to Roth through Valley; Valley was unable to pay Continental because Roth was unable to pay Valley. The Valley receivable

as shown on Continental's financial statement was worthless. Less than two months after Lybrand had given a clean certificate to Continental's financial statement, the SEC's complaint averred:

> "Under the stewardship of the individual defendants, less than a year and a half after raising more than $5 million from the public, defendants are unable to account to the Commission, the American Stock Exchange or the investing public as to Continental's true financial picture and the disposition by Continental of the funds it received. As officers and directors, under the aegis of Roth, they have stood idly by and watched millions of dollars of securities holders' moneys flow through Valley to Roth and family for reasons for which they are unable to account. They have permitted hundreds of thousands of dollars of the amount received by Valley to be advanced in many cases without interest or security, to themselves. The books and records of Continental and Valley are so incomplete and inadequate that no proper Form 10-K can be filed until an independent audit has been made under the supervision of a receiver acting under the direction of this Court. Defendants have in their possession, custody and control money and property of Continental and Valley which they may transfer, sell, assign, pledge or otherwise waste or dissipate to the immediate and irreparable loss and damage of Continental's public security holders, unless the Court appoints a receiver of the assets of Continental and Valley." (95a-106a).

The Conservator was unable to prevent insolvency. An involuntary petition praying that Continental be reorganized pursuant to Chapter X of the Bankruptcy Act was filed in the Eastern District of New York and by order dated July 12, 1963, the Hon. Jacob Mishler, the United

States District Court Judge for the Eastern District of New York, granted the involuntary petition and appointed the Conservator, under Judge Bonsal's order, and Irving L. Wharton as Co-trustees of Continental. Irving L. Wharton, a citizen and resident of the State of New York, is now the sole duly qualified and acting Trustee of Continental (95a-106a, R 267, 321-22).

B. The Trustee's Civil Suit

By September 1964, more than two years before the criminal indictment, the Trustee had decided to bring suit against Lybrand. The complaint was not filed at that time since, at Lybrand's request, the Trustee and Lybrand undertook negotiations to explore the possibility of settling the Trustee's claims without suit. The negotiations failed, and on July 1, 1965, the Trustee filed a civil action (65 Civ. 664) naming as defendants Lybrand, a financial institution and Harold Roth. The action against the financial institution has been withdrawn due to settlement. Harold Roth has taken the Fifth Amendment and Lybrand remains the only defendant subject to discovery. The petitioners are the central actors in the Lybrand engagement and are the only persons who can supply information relating to the vital areas of the Continental audit (108a).

The Trustee's complaint alleges in essence: 1) breach of contract and warranty for each of the audit years 1958 through 1962; 2) negligence and reckless behavior on the part of Lybrand in regard to each of the audit years 1958 through 1963; and 3) conspiracy to despoil the assets of Continental and to conceal these acts through various means, including the certification and issuance of false financial statements by Lybrand (11a, 108a, R 276-363).

Immediately after the filing of the complaint, the Trustee began extensive discovery proceedings against Lybrand.

By mutual agreement of counsel, it was arranged that all Lybrand worksheet papers and documents relating to the audit years in question were placed in the tax conference room at Lybrand and made available to the Trustee's attorneys and accountants. By September 1965 the Trustee began conducting depositions upon oral examinations of various members of the Lybrand firm, including the deposition of petitioner Simon. By the week of October 11, 1966, the Trustee was finishing his examination of one McDevitt, a Lybrand employee, and by mutual agreement the deposition of Kaiser was scheduled for October 21, 1966. Kaiser's appearance had been scheduled for an earlier date, but due to the pressures of Lybrand business, the Trustee's counsel agreed to a postponement (12a).

C. The Criminal Indictment

On October 17, 1966, 15 months after the filing of the Trustee's complaint, an indictment was returned in the Southern District of New York naming Roth and petitioners Simon, Kaiser and Fishman. Among the co-conspirators named but not indicted was the Lybrand firm and McDevitt (75a-89a).

There are, admittedly, points of approach and contact between the issues raised by the Southern District indictment and the Trustee's civil case. Of course, in that the indictment is not concerned with events prior to 1961 and is not concerned with questions of breach of contract, breach of warranty and of negligence, it differs substantially from the complaint. There are significant areas open for examination which have absolutely no relation to the issues raised in the criminal case.

D. Petitioners' Voluntary Disclosures to the Government

During the course of the criminal investigation, petitioners Kaiser, Simon and Fishman were represented by competent counsel. Petitioners and the Lybrand firm, adopted the position that they were going to make full disclosure to the Government and to the SEC in order to stave off the threatened indictment. Accordingly, all of the Lybrand worksheet papers, including those prepared by the petitioners, were made available to the Government and the Government's accountants. More important, Kaiser, Simon and Fishman appeared before the Federal Grand Jury and testified, not once, but several times, as did other representatives of the Lybrand firm (R 63-65, 26a-27a).

Petitioners, as well as Lybrand, asked permission to present accounting experts to testify before the Grand Jury; this permission was granted and outside accounting experts testified in petitioners' behalf. Counsel for petitioners joined separate counsel for the Lybrand firm in submitting to the United States Attorney's Office a detailed written memorandum which contained petitioners' factual contentions and theories in their defense in regard to the criminal charges. Thus, petitioners, as well as the Lybrand firm, voluntarily gave to the Government the widest latitude of discovery (R 62-65, 26a-27a).

E. Kaiser Deposition

Soon after the criminal indictment was filed, counsel for petitioners and counsel for Lybrand took the position that the depositions in the Eastern District civil action should be stayed. However, only Kaiser moved in the United States District Court for the Eastern District of New York

before Judge Mishler for a vacatur of his scheduled deposition under Rule 30(b) of the Federal Rules of Civil Procedure. His motion was based on very restrictive grounds: that his mere appearance at the depositions, in light of the criminal indictment, would be oppressive and violative of his constitutional rights. Kaiser's counsel refused to state to the Court whether or not Kaiser intended to invoke any constitutional privilege at his examination. Judge Mishler ruled that there was nothing oppressive about Kaiser's mere appearance at his scheduled examination and that assertion of constitutional rights on a motion to vacate was premature. Accordingly, Kaiser was ordered to appear for examination, but was free to assert at the examination any constitutional privilege he might think appropriate (45a-48a).

Kaiser appealed, but that appeal was dismissed summarily on October 16, 1966, obviously because it was premature—nothing of significance had yet occurred in the Court below. The Court of Appeals remanded matters back for further proceedings in the District Court (59a).

On October 26, 1966, Kaiser appeared at his scheduled deposition at the United States District Court for the Eastern District of New York. Kaiser waived his Fifth Amendment privilege and chose to testify for the remainder of that day. On October 31, 1966, Kaiser again appeared at his scheduled examination, waived his privilege under the Fifth Amendment and testified during that day. Further deposition dates were fixed for November 2 and November 4, 1966. Never once did Kaiser assert his Fifth Amendment privilege to avoid the lawful process of the Eastern District Court either under the due process or self-incrimination clauses (R 4-17).

On October 27, 1966, petitioners added to the already impressive array of legal talent representing them. They

switched forums and moved in the criminal motion part in the Southern District of New York for an order enjoining the civil case against Lybrand until the completion of the criminal case, on the grounds that the continued depositions would provide evidence to the Government, otherwise unavailable to it, and that the depositions would be burdensome (90a).

On November 1, 1966, Judge Bryan heard oral argument on the application and papers were submitted to him. He held no hearings. Approximately 37 days passed and nothing was heard from Judge Bryan. During that time Judge Mishler became concerned with what he considered to be an interference with the legitimate jurisdictional exercise of the Eastern District. He was concerned that the delay was affecting the moving of the civil case for trial; the just prompt determination of the rights of creditors; and was unduly interfering with the plan of reorganization and the winding up of Continental's affairs, now more than three and-a-half years old. Accordingly, he issued an order on December 5, 1966 in furtherance of his original order of October 24, 1966 directing that the examination of Kaiser go forward despite the temporary stay, now more than 20 days old, issued from the Southern District of New York, which assumed to the Southern District the power to stay the Eastern District process (60a-63a, 64a-71a). Both sides found themselves on the horns of a dilemma with the Eastern District ordering them to proceed and the Southern District ordering a stay. Kaiser then moved before the Court of Appeals for a temporary stay of Judge Mishler's direction of December 5, 1966. The Court of Appeals granted a temporary stay in order to give Judge Bryan a chance to render his decision. Several days later, Judge Bryan issued the instant opinion which enjoined the Trustee from examining Kaiser, Fishman and Simon.

F. Judge Bryan's Order and Court of Appeals Reversal Thereof

Judge Bryan's opinion holds that "civilized standards of procedure and evidence" require that a person under indictment be given the option of non-appearance in any related civil case outstanding in any federal or state court. Moreover, this option need not be asserted in the forum that controls the civil litigation. Judge Bryan assumed to himself "sitting in the criminal motion part" a supervisory power over the process of every other federal or state court. Accordingly, he stayed the legitimate process of the Eastern District of New York without requiring petitioners to make a meaningful application before that Court. He originated his vast display of power despite the fact that petitioners had adequate remedies under either the Fifth Amendment or a motion under 30(b) of the Federal Rules of Civil Procedure. Judge Bryan's opinion is not justified by precedent or by necessity.

Every case relied on by Judge Bryan (See cases cited in footnote on pg. 10 of petitioners' brief), indeed every reported case on this subject, are cases that were brought under Rule 30(b) of the Federal Rules of Civil Procedure before the district court or judge controlling the civil case. They all stand for the proposition that the district court controlling the civil case has a discretionary power to stay its proceedings under Rule 30(b) of the Federal Rules of Civil Procedure if the movant can show that the civil case is being used as a "dodge" to subvert the criminal case or to avoid the protections of the Fifth Amendment. And absent the ability to make such a showing, a witness in a civil proceedings can avoid testifying in those proceedings only by invoking his rights under the self-incrimination clause of the Fifth Amendment.

The Court of Appeals reversed Judge Bryan because it was conceded that the Trustee's civil case was an independent proceeding brought long before the criminal case and in furtherance of the legitimate interests of literally thousands of security holders and creditors; that "the Trustee requires" the petitioners' "deposition testimony to complete his preparation for the trial of the Eastern District action, which must be received before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed"; it is conceded that the Trustee seeks in "good faith" to depose the appellees for that purpose alone, and there has been no consultation between the Trustee and the Government in regards to the conduct of the Trustee's civil case (A7). The Court of Appeals assumed that Judge Bryan had the power to act, but reversed Judge Bryan because they recognized that there is nothing about the Trustee's civil case that is "unfair" or threatens the integrity of the criminal case.

Reasons for Denying the Writ

1) The proceedings in the Courts below represent, as far as petitioners are concerned, an effort to suppress the Government's use of evidence upon petitioners' forthcoming criminal trial and therefore is not subject to piecemeal review by this Court.

2) This petition presents no substantial or important questions which require resolution by this Court. The numerous federal court decisions relating to the episodic situation here presented have established clear and fair standards. There is no conflict between the Fifth and Second Circuits on these standards.

I

It is clear that petitioners were attempting in the Courts below to suppress the Government's use of evidence in advance of the criminal trial. The only difference between petitioners' application before Judge Bryan and a traditional motion to suppress under Rule 41(e) of the Federal Rules of Criminal Procedure is the fact that the evidentiary material here complained of was not yet in being. Petitioners' status in the Courts below is the same as if a motion to suppress evidence had been made and denied. As such, these proceedings are no more than a step in a pending criminal case relating to the possible use by the Government of evidence in connection with the criminal trial. In this Court's ruling in *DiBella* v. *United States,* 361 U.S. 121 (1962) such pretrial rulings affecting the criminal case are not subject to piecemeal review and this Court will wait until the completion of the criminal trial before entertaining appeal.

II

Petitioners admit on page 10 of their brief that federal courts deal "frequently with questions concerning the control of discovery in concurrent civil and criminal litigation in order to avoid prejudice . . ." They do not suggest that the standards set down in *Campbell* v. *Eastland,* 307 F2d 478 (5th Cir. 1962), cert. denied 371 U . 955 (1963), and in the cases cited thereunder in the footnote on page 10 of their brief are inadequate. Indeed, they urge them. The Court of Appeals' decision in the present case is in complete accord with the standards set down in *Campbell* v. *Eastland* and cases cited thereunder. There is absolutely no conflict between the Circuits.

III

The standards established by those cases require that a motion to stay or limit discovery must be made under Rule 30(b) of the Federal Rules of Civil Procedure before the court in which the action is pending, and absent the ability to show that the process of the Federal Rules of Civil Procedure is being used as a "dodge" to circumvent or subvert the criminal case, a witness in the civil proceeding can avoid testifying only by assertion of his privilege against self-incrimination. Indeed, the entire problem here is one of Fifth Amendment dimensions. Petitioners point out that the Government would not be able to obtain petitioners' testimony on its own. However, if petitioners took the same position with the Government as they have done with the Trustee, namely, to waive their rights against self-incrimination and voluntarily make disclosures to the Government, then, of course, the Government would be entitled to use those disclosures. (In fact, petitioners have done exactly that and have made full disclosure to the Government). It is the privilege against self-incrimination which restricts the Government from obtaining discovery from a defendant in a criminal case. Why, then, should it be unreasonable to request the petitioners to assert that same privilege in the Trustee's civil proceedings.

Judge Bryan seeks to excuse petitioners from the requirement of asserting their privilege against self-incrimination by suggesting that such assertion would end the professional careers of petitioners. This claim by petitioners is seductive; it is not supported by a scintilla of evidence in the record below. Petitioners have been unable to cite any rule, law, canon of professional ethic or State licensing requirement which indicates that a certified

public accountant must lose his professional standing upon assertion of the privilege. We can find none; and if there were one, this Court's recent opinion in *Spevack* v. *Klein*, 87 S.Ct. 625 (1967), would render it inoperative. Moreover, petitioners are career men in the Lybrand organization. Lybrand has publicly announced in the press that the firm "vigorously supports" petitioners in their defense of the criminal case. Lybrand has provided them with counsel; Lybrand obviously approved of petitioners' original application before Judge Bryan which sought to seal the lips of all Lybrand personnel; and it is equally obvious that Lybrand supports petitioners' present application. The idea that Lybrand would continue its support if petitioners seek to remain mute on a claim based on the due process clause of the Fifth Amendment, but would abandon them in punishment if they were to remain mute on a claim based on the self-incrimination clause of the Fifth Amendment, is stretching credulity to the breaking point.

Contrary to the assertion on pages 11 and 12 of petitioners' brief, the Court of Appeals completely and correctly stated the nature of the petitioners' Fifth Amendment rights in the instant controversy:

> "It is true that appellees have testified in the trustee's depositions and before the grand jury that indicted them without asserting their priviliges against self-incrimination. Since, however, 'it is well established that a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding,'" United States v. Miranti, 253 F. 2d 135, 139 (2 Cir. 1958); see 8 Wigmore, Evidence §2276, at 470-72 (McNaughton rev. 1961), the appellees Kaiser and Fishman certainly, and Simon probably, could have interposed the privilege when the trustee sought to depose them after the indictment was returned..

"Appellees urge that, as accountants, they 'would lose their professional lives' by invoking the privilege. We are not sure that they would, if it were made clear that the privilege was claimed only on advice of counsel in order to prevent pretrial disclosure of their factual contentions. Whether or not they would, however, the same dilemma is faced by any witness in a civil or criminal trial who is himself under investigation or indictment for other crimes. Such a witness must either invoke his privilege against self-incrimination, or assume 'the general duty to give what testimony one is capable of giving.'" See 8 Wigmore, Evidence §2192 (McNaughton rev. 1961).

"It is for the same reason that a witness who has been given immunity from prosecution must testify although his testimony may expose him to such extra-legal pressures as 'loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium.' Ullmann v. United States, 350 U. S. 422, 430 (1955); see Piemonte v. United States, 367 U. S. 556 (1961). We cannot agree that 'civilized standards of procedure and evidence,' McNabb v. United States, supra at 340, require that a witness under indictment be given the option of non-appearance in any proceedings in related civil or criminal cases until his own trial is concluded." (A9).

IV

The only real effect of Judge Bryan's injunction is to afford the petitioners a preferred status and relieve them of the obligation of asserting their privilege of self-incrimination. To do this he conjures up an arbitrary power that threatens to create a situation of injunction and counter-injunction between federal courts. The Court

of Appeals correctly recognized that the situation brought about by petitioners' refusal to exercise their rights under the Fifth Amendment and under Rule 30(b) of the Federal Rules of Civil Procedure did not require Judge Bryan's display of raw power. Contrary to the contention in Point III of petitioners' brief, Chief Judge Lumbard correctly assessed the possibility of chaos inherent in Judge Bryan's ruling:

> "We are also led to reverse Judge Bryan's order by the consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here." (A9).

V

There is no conflict between the Fifth Circuit's decision in *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), and the decision of the Second Circuit in the present case. Contrary to the assertion in Point II of petitioners' brief, the decision of the Court of Appeals is completely in accord with the governing principles enunciated by the Fifth Circuit. The *Campbell* case rested on facts significantly different from the instant application. In that case, prospective defend-

ants in a criminal tax prosecution commenced a civil action for a tax refund. The facts underlying the claim for refund were known to the plaintiffs. The Court found that the civil suit was commenced as a "dodge" in order to enable the plaintiffs to discover from the government statements and reports protected under Title 18 U.S.C. § 3500, and "to be honest about it, the motion for discovery (if not the suit for refund) was for the purpose of obtaining otherwise unobtainable reports." 307 F2d 478, 490. The entire proceedings were brought before the judge in charge of the civil case. He granted discovery of the § 3500 reports. It was in that context that the Fifth Circuit set down the governing principles approved of by petitioners and set forth, in part, on pages 12 and 13 of their brief:

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive . . . Separate policies and objectives support these different rules.
>
> ". . . 18 U.S.C.A. § 3500 does away with any pretrial discovery of statements of a government witness. A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.

> In some situations it may be appropriate to stay the civil proceeding. United States v. Bridges, N.D. Calif., 1949, 86 F.Supp. 931. In others it may be preferable for the civil suit to proceed—unstayed. In the proper case the trial judge should use his discretion to narrow the range of discovery. Here, however, the trial judge seemed to think that he had no discretion—once discovery was moved for in a civil suit." 307 F2d 478, 487.

It is significant that the Fifth Circuit placed the burden of "judicial discretion and procedural flexibility" in the hands of the judge in control of the civil case. Even in such a patent situation as presented by the *Campbell* case, the Fifth Circuit did not suggest that judicial discretion should prohibit the plaintiff from all discovery:

> "Limited discovery and other remedies were available which would not be vulnerable to improper inspection. Thus, the plaintiffs were clearly entitled to discovery of any documents obtained from the plaintiffs' files. By interrogatories under Rule 33, the plaintiffs could learn the names and addresses of persons having knowledge of relevant facts. By depositions under Rule 26, they could ascertain relevant facts known to the agents. . . ." 307 F2d 478, 488.

If anyone failed to use "judicial discretion and procedural flexibility" in relation to the instant case, it was Judge Bryan. He cut off all discovery of petitioners by the Trustee. Only Judge Mishler, sitting as the Rule 2 Judge in control of the civil case in the Eastern District of New York, could exercise that "judicial discretion and procedural flexibility" called for by this situation. Under Rule 30(b) of the Federal Rules of Civil Procedure petitioners could have moved, and still can move, for an

order impounding their depositions. This, of course, would have completely eliminated petitioners' claimed prejudice. Petitioners' counsel admitted on oral argument before the Court of Appeals that such an order would effectively protect petitioners. Only Judge Mishler could have employed the "limited discovery" provisions called for by *Campbell* v. *Eastland, supra*. As we have pointed out, petitioners have made substantial voluntary disclosure to the Government. They are in possession of their Grand Jury testimony. It is conceded that discovery by the Trustee to the same extent as the information already voluntarily given to the Government could not in any manner prejudice petitioners.

Petitioners on page 13 of their brief, attempt to create the appearance of conflict by quoting out of context a single phrase in the Second Circuit's opinion. The Second Circuit's remark, "we decline to follow", related only to petitioners' erroneous analysis of three district court cases; it had no relation whatsoever with the Fifth Circuit's opinion:

> "Judge Bryan relied heavily upon two lines of cases in which it has been consistently held that where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter • • • whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence,' citing, for example, Campbell *v.* Eastland, 307 F. 2d 478 (5 Cir. 1962), cert. denied, 371 U. S. 955 (1963), "or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution," citing Perry *v.* McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964), Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil Co., Inc., 14 F.R.D. 333 (E.D. Pa. 1953), and National Discount Corp. *v.* Holz-

baugh, 13 F.R.D. 236 (E.D. Mich. 1952), 262 F. Supp. at 74.

"Both lines of cases seem to us to be inapposite. Cases where the criminal defendant seeks disclosure of the government's evidence, or the government seeks disclosure of the defendant's, are distinguishable because here the trustee, who seeks to depose appellees, is pursuing an independent action on behalf of Continental's creditors and security holders, which was commenced more than one year before the indictment was found. And the cases in the second line appear to us, as they did to Judge Mishler in his opinion of October 24, 1966, to rest upon the deponent's assertion of his privilege against self-incrimination; to the extent that they do not, we decline to follow them. In both National Discount Corp. *v.* Holzbaugh, supra, and Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil, Inc., supra, the deponents explicitly asserted their privileges against self-incrimination, and the court in Perry *v.* McGuire, supra, cited both cases in holding that interrogatories directed to a criminal defendant "would be oppressive and would infringe on his constitutional rights." 36 F.R.D. at 273. Moreover, all three cases arose on Rule 30(b) motions made in the court in which the civil action was pending; none is a precedent for the injunction Judge Bryan issued."

VI

Indeed, if considerations of fairness are considered, they require that the Trustee be permitted to continue the expeditious prosecution of his independent civil suit. Petitioners have voluntarily given the Government their factual contentions and the basis of their defense. Ironically, it is only the Trustee who has been denied the factual

contentions of petitioners. This, coupled with the fact that petitioners doggedly refuse to take advantage of the clearly adequate remedies available to them in the civil case, indicates that petitioners' real desire is to frustrate the Trustee in his civil suit against Lybrand. Petitioners and the Lybrand firm clearly recognize that the delay of months and possibly years may very well be disastrous with regard to the Trustee's ability to continue his long and expensive suit. Judge Bryan found that the civil case is not ready for trial. That is precisely the point. The Trustee cannot get the civil case ready for trial without the factual contentions of petitioners. Judge Mishler, who is far more familiar with the civil case, has clearly stated that the delay occasioned by Judge Bryan's stay, now more than six months in duration, severely prejudiced the Trustee's suit and ability of the Trustee to wind up the affairs of the bankrupt, now almost four years old.

The Court of Appeals for the Second Circuit clearly and concisely enunciated the balance on the conflicting interests:

> "This appeal requires us to balance appellees' desire to prevent pretrial disclosure of their factual contentions to the prosecution in the Southern District criminal proceeding, without asserting their Fifth Amendment privileges against self-incrimination, against the interest of the trustee, representing numerous creditors and public security holders of Continental, in the expeditious progress of the Eastern District action. The trustee requires the appellees' deposition testimony to complete his preparation for the trial of the Eastern District action, which must be resolved before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed. It is conceded that the trustee seeks

in good faith to depose appellees for purposes of the Eastern District action, and that there has been no consultation on lines of questioning between the trustee and the United States Attorney for the Southern District.

"Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privileges against self-incrimination. . . . As long as appellees' preparation for the Southern District criminal trial is not hampered, we see no valid distinction in the fact that appellees' remaining depositions could not be scheduled until after the indictment was returned. In both cases, if appellees choose not to assert their privileges against self-incrimination, we see no reason why their testimony should be withheld from the trustee. The fact that additional testimony thereby becomes available to the government is merely the natural byproduct of another judicial proceeding; and to that extent it might be 'discovery', but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees. Indeed the constitutional rights of the appellees are unimpaired; here they are in suspension because the appellees have not chosen to avail themselves of their Fifth Amendment privileges."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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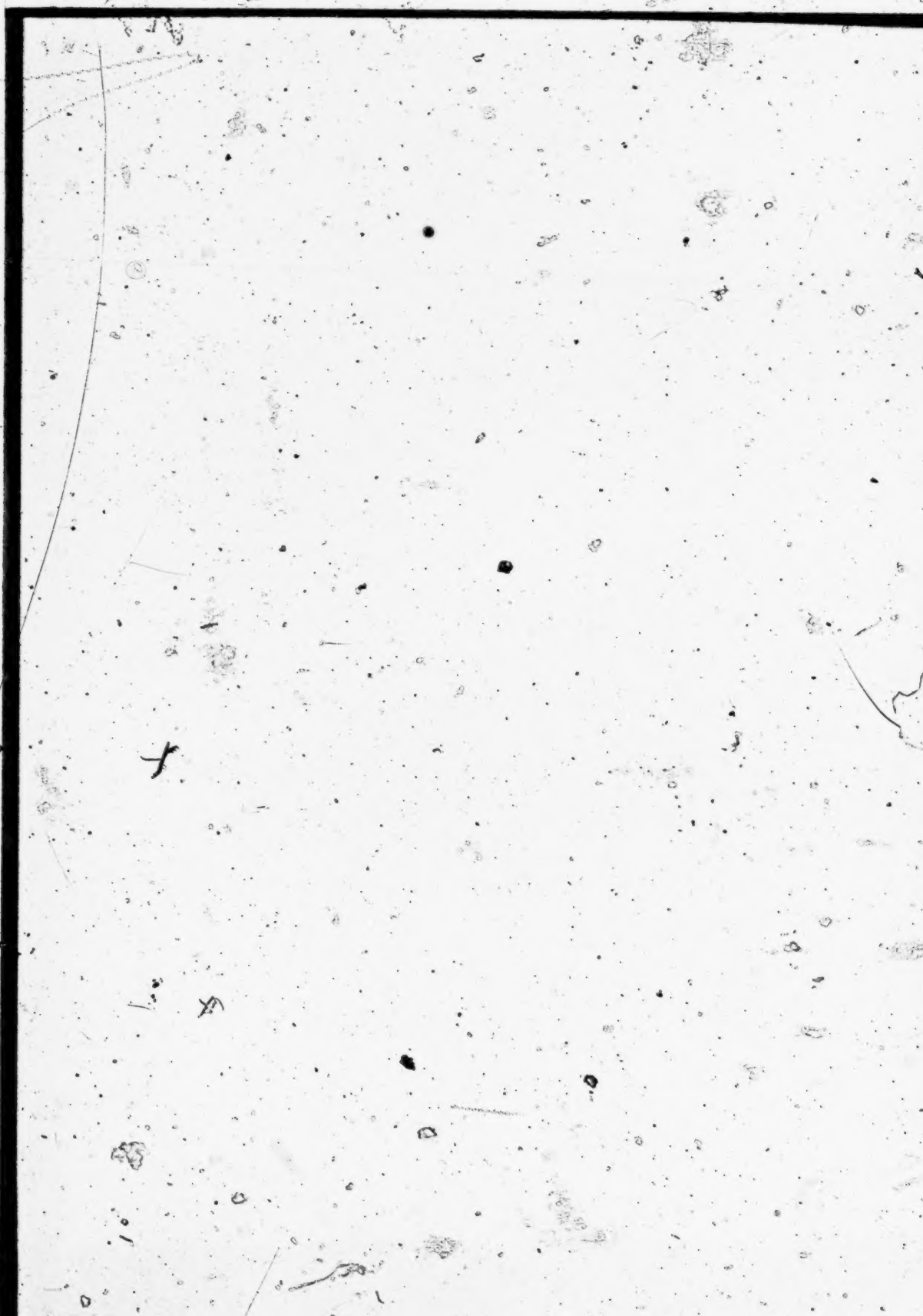

SUPREME COURT, U. S.

SEP 5 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 72

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Petitioners,

v.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

Respondent.

PETITIONERS' BRIEF

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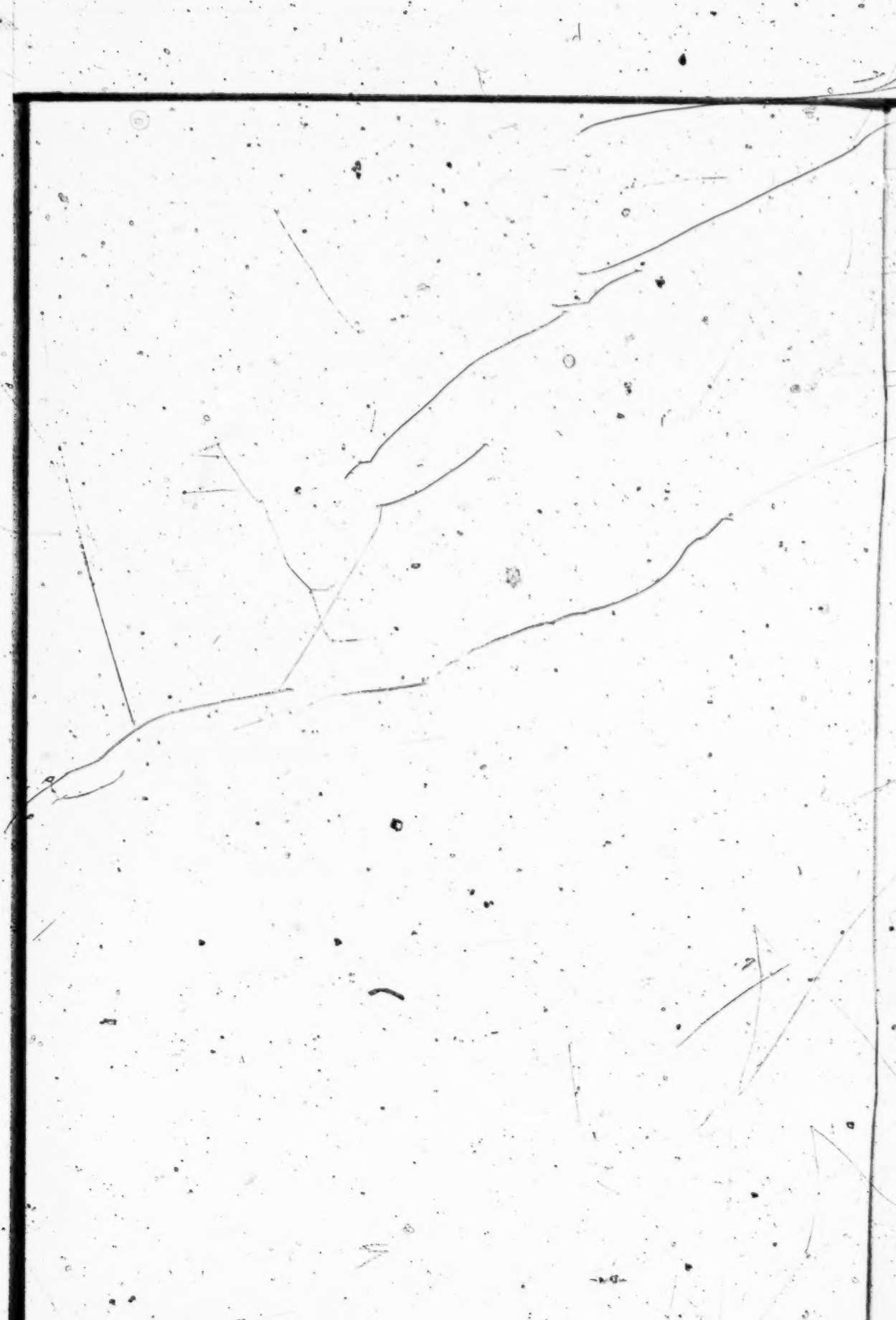

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IN THE

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No. 72

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

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v.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

Respondent.

PETITIONERS' BRIEF

Petitioners are independent public accountants who have been indicted by a federal grand jury for mail fraud and conspiracy in connection with the financial statements of a client of their accounting firm, Lybrand, Ross Bros. & Montgomery.

Notwithstanding District Court findings (Judge Frederick van Pelt Bryan) that an injunction of limited duration against the taking of petitioners' depositions in a related civil case was necessary to protect petitioners' rights to a fair criminal trial, a majority of the Court of Appeals for the Second Circuit (Judge Wilfred Feinberg dissenting) dissolved the injunction in an opinion which is reported at 373 F. 2d 649 (178).* After the mandate

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* References in parentheses are to the Transcript of Record.

of the Court of Appeals was stayed by Mr. Justice Harlan of this Court (190), the District Court continued the injunction pending proceedings in this Court.

The carefully reasoned opinion of the District Court granting the original injunction is reported at 262 F. Supp. 264 (150).

The Question Presented

This petition presents the question whether a federal criminal court may act to insure a fair criminal trial by enjoining the taking of the depositions of the defendants in the criminal case in related private civil litigation pending in another federal district.

Constitutional Provisions, Statutes and Rules Involved

The constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States. Apart from the inherent power of a federal criminal court to preserve the integrity of a criminal trial, the statute giving the District Court power to issue the injunction is 28 U.S.C. §1651(a). The rules giving the District Court discretion to enter the injunction are Rules 2 and 57(b) of the Federal Rules of Criminal Procedure.

Statement of the Case

Petitioners Simon and Kaiser are partners and petitioner Fishman is a senior professional associate of the national independent accounting firm of Lybrand, Ross Bros. & Montgomery ("Lybrand"). All three have been

indicted in the United States District Court for the Southern District of New York upon charges of conspiracy to file false financial statements with the Securities and Exchange Commission and of mail fraud in connection with the financial statements of Continental Vending Machine Corp. ("Continental"), a client of the Lybrand firm. The Lybrand firm is not indicted but is named as a co-conspirator (85). The indictment was filed October 17, 1966, and the defendants have pleaded not guilty.

A. The Civil Action in the Eastern District of New York

Fifteen months before the indictment, Continental's trustee in reorganization under Chapter X of the Bankruptcy Act, respondent Wharton, brought a civil action against the Lybrand firm in the United States District Court for the Eastern District of New York, claiming damages for alleged negligence, fraud and conspiracy in connection with the same Continental financial statements alleged in the indictment as well as in connection with earlier ones. Petitioners are not named as defendants in the civil action (9).

In September 1965, respondent trustee began taking the oral deposition of petitioner Simon as a witness in the civil case. Simon testified for sixteen days and the transcript of his deposition is over 1800 pages. His deposition has been adjourned, but remains open for further direct examination (152). Before the indictment was filed, the trustee also took the depositions of several other Lybrand partners and associates (152) as well as extensive depositions of many other witnesses.

B. The Kaiser Deposition

In October 1966, just a few days before the indictment, counsel for Lybrand and counsel for the trustee agreed that the deposition of petitioner Kaiser would commence on October 20 (5). When the indictment was filed on October 17, counsel for Lybrand and Kaiser's personal counsel sought unsuccessfully an adjournment of the deposition so that the situation could be reconsidered in light of the indictment, and in particular so that Kaiser could retain and consult with counsel for the criminal case.

Unable to arrange an adjournment with counsel for the trustee, Kaiser's counsel was compelled to move on October 21, 1966 in the civil case for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure to prevent the deposition upon the ground that Kaiser's appearance at a deposition at that time would violate his right against self-incrimination and would be oppressive (6, 79). Kaiser was the sole moving party.

The motion was argued on October 21 on papers served in the early hours of that day.

Kaiser's motion was denied by Judge Jacob Mishler of the Eastern District on the ground that Kaiser was required to appear and assert his privilege against self-incrimination if he chose not to testify (79-83). As Judge Mishler said in denying the motion (80):

> "Kaiser's argument for a protective order is that compulsory appearance for examination is oppressive, and constitutes a violation of his Fifth Amendment right against self-incrimination."

Judge Mishler had ruled at oral argument that no other question was before him.

Judge Mishler's decision was filed October 24. It directed Kaiser to appear for examination on October 26 (82).

On October 25, Kaiser appealed to the Court of Appeals from Judge Mishler's decision and moved for a stay of the deposition pending appeal. The motion was argued October 26 and on that day the Court of Appeals denied the motion and dismissed the appeal, presumably on the ground that the order was not appealable, "without prejudice to anything which may transpire in the Court below" (6).

On the afternoon of October 26, Kaiser and his counsel appeared before Judge Mishler for the commencement of the deposition (5, R 4).* Kaiser's counsel moved for a week's adjournment of the deposition so that Kaiser could retain trial counsel for the criminal case and consult with him with respect to the deposition. The motion was denied from the bench and the deposition began (R 4-17).

Judge Mishler advised Kaiser of his rights against self-incrimination and asked Kaiser if he intended to waive those rights (R 19-22). Kaiser stated that he would not assert the privilege and answered the questions put to him. At the end of the day, the deposition was adjourned to October 31, when Kaiser again testified and when further deposition dates were fixed for November 2 and 4 (6).

C. The Motion for an Injunction in the Southern District of New York

On October 27, petitioner Kaiser, together with petitioners Simon and Fishman, retained counsel for the criminal case, who moved on November 1 in the Criminal Motion

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* "R" references are to unprinted parts of the Record in the Court of Appeals.

Part in the Southern District of New York on behalf of all three defendants for an injunction against respondent to prevent him from continuing the civil case against Lybrand until the completion of the criminal case on the grounds that the continued depositions would provide discovery to the Government which was not otherwise available to it and that the depositions would impede preparation for the defense of the criminal case (1-3).

On December 12, 1966, Judge Bryan granted the motion in part, holding that the taking of petitioners' depositions should be enjoined for ninety days, after which the injunction could be continued upon application by petitioners for good cause shown. 262 F. Supp. 64 (150). The injunction order was entered December 16, 1966 (173).

D. The Decision of the District Court.

The District Court found that both the indictment in the Southern District of New York and the complaint in the civil case pending in the Eastern District of New York charge fraud with respect to a number of the same transactions and that the subject matter of the indictment and of the civil complaint are, in the main, the same. The District Court found that the Assistant United States Attorney in charge of the criminal case had relied extensively in the presentation of the case to the Grand Jury upon materials yielded by discovery proceedings in the civil case, that he had been in personal contact with the attorneys for the trustee and that all deposition transcripts from the civil case had been made available to him (160, 84). The District Court noted that the prosecution would continue to make use of further depositions in the preparation and trial of the criminal case (160, 139).

Upon these findings, the District Court enjoined the civil depositions upon the ground that petitioners

> ". . . will suffer substantial and irreparable prejudice in their defense of the criminal charges against them if the Trustee continues to take their depositions at this time and that it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings." (168)

The District Court found that the availability to the prosecution of extensive civil discovery would contravene the far more limited discovery provisions of the Criminal Rules:

> "The practical effect of denying injunctive relief against the taking of the depositions of the three criminal defendants at this time is likely to permit the prosecution to have full disclosure in contravention of the protections given defendants by the Rules of Criminal Procedure." (162)

The District Court carefully weighed and considered the possible delay and inconvenience to the civil plaintiff of the temporary postponement of the depositions, and concluded that in balancing the probable prejudice to the defendants in the criminal case against reasonable delay in the taking of three depositions in a protracted civil case, the "scales are tipped overwhelmingly" in petitioners' favor (169).

In a decision which is unassailable in its logic and enlightened but coldly practical in its approach to the fair administration of criminal justice, the District Court observed:

> "If there is reasonable probability that either the prosecution or the defense will be able to secure a

> full disclosure of the other side's case while relying on the rules to prevent disclosure of its own, there is . . . unfairness likely to affect the result of the trial of such importance and significance as to require the intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it". (162)

The District Court reviewed the sharp distinctions between the broad discovery allowed in civil cases and the very limited discovery permitted in a criminal case. The Court analyzed previous decisions which have held that "where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter." (163) The Court observed that this principle applies equally whether the Government or the defense seeks a stay.

Recognizing the duty of the Federal District Courts to insure fairness in criminal trials, Judge Bryan concluded that the District Court has both the explicit and inherent power to grant an injunction to preserve petitioners' rights to a fair trial.

E. The Decision of the Court of Appeals and Continuance of the Injunction by the District Court

On appeal by respondent trustee, the Court of Appeals reversed the injunction on March 3, 1967, with Circuit Judge Feinberg dissenting (178-187). The judgment of the Court of Appeals was entered the same day (188).

In its opinion, the Court of Appeals majority (Lumbard, Chief Judge and Judge Smith) held that petitioners'

only remedy against depositions which would jeopardize their rights to a fair criminal trial was to assert the privilege against self-incrimination (183). Although not expressly deciding the question, the Court of Appeals assumed that the District Court had the power to enter the injunction (182).

Circuit Judge Feinberg, in his dissent, adopted the reasoning of the District Court, stating:

> "If the trial court by order allowed the Government full discovery in the criminal case and denied it to defendants, all would agree that this would be basically unfair. Yet that is what may well happen because of this reversal. The absence of collusion between the trustee in the civil suit and the Government in the criminal suit is not controlling; the effect of the discovery on defendants in the criminal case is." (186)

After moving unsuccesfully in the Court of Appeals for a stay of mandate, petitioners applied to Mr. Justice Harlan for a stay of the mandate and for continuance by this Court of the District Court's injunction pending petition for certiorari to this Court. Mr. Justice Harlan, by order and memorandum opinion of March 13, 1967, stayed the Court of Appeals mandate but denied, without prejudice to prompt application in the District Court, petitioners' motion for continuance of the injunction. Thereafter, petitioners moved in the District Court for continuance of the injunction and that motion was granted on March 17, 1967 (189). The District Court found that the civil case was "by no means ready for trial" (192) and concluded that "if the injunction order expiring on March 17, 1967 is not continued in effect for at least a limited period such unfairness in the

criminal trial is likely to result as to require the continued intervention of the criminal court to insure the fair administration of criminal justice and the rules governing it." (194)

This Court granted certiorari on May 8, 1967, and the injunction remains in effect pending disposition of this petition. (195)

F. The Relevant Facts

The facts upon which the District Court based its decision to grant the injunction are simply stated and are not in dispute.

Both the indictment (85) and the civil complaint (9) concern the financial statements of Continental, a publicly-held company whose securities were listed on the American Stock Exchange (49-68). Continental was a client of the Lybrand firm and the petitioners' sole connection with the allegedly false financial statements was as independent public accountants (4, 68). The function with respect to which they stand accused, in both the criminal and civil cases, was to examine, in accordance with generally accepted auditing standards, and to express an opinion upon the financial statements of their client. As the District Court noted, this is the first time that a criminal prosecution has been brought against members of a leading accounting firm for alleged deficiencies in a professional engagement. (158).

The matters alleged in the civil complaint form the basis of the criminal charges. The principal charges in both cases relate to Lybrand's examination of Continental's 1962 financial statements (83, 158).

It is also undisputed that the deposition testimony so far given by petitioners Simon and Kaiser relates to the matters alleged in the indictment. Both were questioned and both testified with respect to factual matters as well as to their views of prevailing auditing standards and accounting principles (8, 84, 115).

As the District Court found, the prosecution has continuously received from the respondent's attorneys the deposition transcripts and documents produced in the civil action (84, 160). The prosecution asserted before the District Court its right to continue to do so (107-109).

As the District Court found (190-91), the civil case is complex. Both parties contemplate extensive discovery—in addition to the depositions of petitioners—before the case can be ready for trial (193).

The injunction issued by the District Court does not impair any substantive right of the trustee in the assertion of his civil claims for damages. All that is involved is mere delay and some inconvenience to the trustee in the preparation of his case, as opposed to insuring to petitioners a fair trial of a federal criminal case in which their professional careers are at stake.

Summary of Argument

A guide to discretion has evolved over the years in the Federal District Courts in cases involving concurrent civil and criminal prosecutions: civil discovery should not ordinarily go forward until the criminal case has been tried. The District Court here correctly held that because of the basic differences between the liberal discovery provisions of the Federal Rules of Civil Procedure and the restrictive discovery provisions of the Federal Rules of Criminal Procedure, it would be inherently unfair to restrict the defendants in a criminal case to the discovery available under the Criminal Rules while the prosecution avails itself of the broad array of discovery devices available under the Civil Rules.

The Court of Appeals held erroneously that petitioners' only remedy against unfairness in the criminal case was to plead the privilege against self-incrimination. It is not the office of the privilege against self-incrimination to harmonize the basic differences in the discovery provisions of the Civil and Criminal Rules.

The District Court clearly had the power to protect by injunction petitioners' rights to a fair trial. The injunction does not impair any substantive right involved in the civil case. Issuance of the injunction was a sound exercise of discretion, for mere delay and inconvenience in the pretrial preparation of a protracted civil case is a small price to pay for insuring the integrity of a federal criminal trial.

POINT I

Civil discovery should ordinarily be suspended pending the disposition of a related criminal case.

In granting the injunction, the District Court recognized a guide to discretion which has become well established in the Federal District Courts: civil discovery should not ordinarily go forward against a defendant in a criminal case when both cases involve the same issues.

In so holding, the District Courts have given appropriate recognition to the basic difference between the liberal discovery provisions of the Federal Rules of Civil Procedure and the restrictive discovery provisions of the Federal Rules of Criminal Procedure. Inherent unfairness arises if defendants in criminal cases are restricted to the discovery available under the Criminal Rules while the prosecution avails itself, directly or otherwise, of the broad array of discovery devices available under the Civil Rules.

Under the Civil Rules, litigants are permitted wide latitude in the pre-trial disclosure of all matters which relate even tangentially to the controversy. *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Depositions in civil cases are not subject to the restrictions which govern the examination of a witness at trial, so that a deposition witness is often obliged to answer all but the most clearly irrelevant or improper questions. Not only facts but opinions and conclusions are frequently elicited from a witness in a civil deposition.

Under the Criminal Rules, however, the Government cannot elicit from defendants, by interrogation under oath, their entire knowledge and even their opinions concerning all of the issues of the case. Similarly, a defendant in a

criminal case is limited in his pretrial preparation to examining his own prior statements and documentary evidence in the possession of the Government. Rule 16, FED. R. CRIM. PRO.

While the discovery available to defendants in criminal cases has been broadened by amendments to the Criminal Rules which became effective July 1, 1966, these newly liberalized discovery provisions do not by any means give to defendants the discovery tools available under the Civil Rules. As the District Court said:

> "It is unnecessary to dwell at any length on the wide differences between discovery in civil and criminal cases. The deposition and discovery process in civil litigation rests upon a broad footing of full mutual disclosure of information. On the other hand, the Rules of Criminal Procedure restrict disclosure to a minimum. . . . The contrasts between the policies and objectives of the civil and criminal procedure are particularly apparent in the provisions of the respective rules relating to depositions." (160-161).

Many district courts have recognized the unfairness inherent in the use by one side of discovery devices unavailable to the other. The district courts have thus frequently granted stays of civil discovery pending the conclusion of a related criminal matter, whether the discovery is sought by the Government or by the defense. Some of the district courts have based stays of civil discovery upon the ground that such discovery would be burdensome to the defendants. See, *e.g.*, *Perry* v. *McGuire*, 36 F.R.D. 272 (S.D. N. Y. 1964); *National Discount Corp.* v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952). In other cases, the district courts have granted such relief primarily upon the ground

that such discovery would violate the defendant's right against self-incrimination. See, *e.g.*, *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953).

National Discount Corp. v. *Holzbaugh*, *supra*, was an action based upon an alleged conspiracy to defraud in which the defendant moved to stay the taking of his deposition pending a criminal trial against him based on the same facts. The court granted the motion:

> "To require the defendant, Althouse, to submit himself to the plaintiff for further oral examination in this civil action, wherein, in the opinion of this Court, the fabric of the fraud is identical with the fraud embraced by the allegations contained in the criminal proceeding now pending against him, at a time when he is awaiting trial on the indictment filed in the criminal matter, would be oppressive and, at least, an indirect invasion of his constitutional rights." 13 F.R.D. at 237.

The Court of Appeals for the Fifth Circuit held in *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) that the district courts should prevent the abuse of discovery by a criminal defendant who seeks to obtain the Government's case by discovery in a related civil action. In that case, the Court made clear the differences between civil and criminal discovery and the need to harmonize the conflicting policies behind them:

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and crimi-

> nal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . Separate policies and objectives support these different rules.
>
> " . . . Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. . . ." 307 F. 2d at 487.

See, also ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, vol. 2, p. 518 (1966); *United States* v. *Maine Lobstermen's Ass'n*, 22 F.R.D. 199 (D. Me. 1958); *United States* v. *Linen Supply Institute*, 18 F.R.D. 452 (S.D.N.Y. 1955).

A recent commentary, in pointing out the sharp differences between civil and criminal discovery, has noted that "[c]ivil procedure . . . has as its object the harnessing of the full creative potential of the adversary process, bringing each party to trial as aware of what he must meet as his finances and his lawyer's energy and intelliegnce permit. . . . Yet virtually no such machinery exists for the defendant accused of a crime. No deposition or admissions procedure is ordinarily available to him." Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180 (1960).

Broader and more comprehensive discovery in criminal cases may well be desirable as a matter of policy, but until that policy is reflected in the Criminal Rules, it is manifestly unfair to give to the Government in a criminal case all of the advantages of the Civil Rules at the same time that the defendant must prepare his case under the restrictions of the Criminal Rules. Accordingly, the District Court here

sought to prevent by injunction the unfairness which would result from the unequal application of two disparate schemes of pretrial discovery:

> "It would be wholly unrealistic to suppose that the prosecution in a criminal proceeding would not gain a very substantial advantage over the defendants if the nature of their defense and the evidence on which the defense was based were disclosed to the government in advance of—and indeed here long in advance of—trial. Every experienced trial lawyer knows well the advantages the prosecution would be likely to gain under such circumstances.
>
> "With such material at its disposal a zealous prosecutor would be able to tailor his case to overcome anticipated defenses and avoid any possibility of surprise. If the defendants took the stand in their own defense, as appears probable in this case, there will already have been a thorough cross-examination of each of them by able and zealous counsel, a very material advantage to the prosecution in conducting its own cross-examination. The advantages gained to the prosecution might well be sufficient to tip the scales in favor of conviction particularly in a close case." (164)

As previously noted, the problem is by no means novel (163). Many other district courts have concluded that civil discovery should be stayed unless compelling reasons dictate otherwise.*

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* *E.g., United States* v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964); *United States* v. *Bridges*, 86 F. Supp. 931 (N.D. Cal. 1949); *United States* v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947); *but see Hiss* v. *Chambers*, 8 F.R.D. 480 (D. Md. 1948), where a stay was denied because the deposition witness was not a party in the criminal case.

(Footnote continued on page 18)

The absence of any collusion between the prosecution and respondent in the taking of petitioners' depositions is not controlling. The District Court found here that although there was no evidence of such collusion (160), the important consideration is the effect upon the petitioners of the Government's use of the depositions after they are taken. As Circuit Judge Feinberg pointed out in his dissent in the Court of Appeals:

> "The absence of collusion between the trustee in the civil suit and the Government in the criminal suit is not controlling; the effect of the discovery on defendants in the criminal case is." (186)

The record before the District Court established beyond dispute that deposition transcripts in the civil case had been made available to the prosecution and that the Government insisted upon its right to the continued assistance of the trustee (84, 108). The Government's use of the deposition transcripts in the preparation of its case creates a probability of unfairness—regardless of collusion. The District Court's injunction prevents even the suspicion of post-indictment collaboration in the depositions of peti-

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The decision of the District Court here was followed and an injunction issued by the District Court for the Western District of Pennsylvania in *United States* v. *American Radiator & Standard Sanitary Corp.*, 66 Crim. 295 (July 28, 1967) after a stay of the civil proceedings had been denied by the court in which the civil cases were pending, *Phila. Housing Authority* v. *American Radiator & Standard Sanitary Corp.* (E.D. Pa., Civ. No. 41773, June 7, 1967). These were antitrust cases, which may involve different considerations. Private treble damage suits may be viewed as a mode of antitrust enforcement and the antitrust laws themselves contemplate the use in civil suits of judgments obtained in Government litigation.

Stays of discovery in civil cases, on the ground of pending related criminal litigation, have been granted in a number of unreported decisions.

tioners and thus prevents even the possibility of conduct which could taint the trial. As Judge Bryan observed, ours is a system of law which "has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

The trustee argued below that petitioners could not identify with requisite specificity the harm they would suffer if their depositions were taken and their whole defense laid bare to the prosecution. But disadvantage and unfairness are inherent in unequal access to discovery. As the District Court observed, it is the impossibility of predicting precisely the turn of disadvantage which compels injunctive relief (165-67). This Court recently held in *Estes v. Texas*, 381 U.S. 532 (1965), that where the probability of prejudice is inherent in the circumstances, it is superfluous to seek identifiable prejudice in order to conclude that due process is wanting.

POINT II

The privilege against self-incrimination is not the sole measure of petitioners' rights against pre-trial disclosure of their case.

The Court of Appeals reversed the District Court's injunction upon the ground that petitioners could prevent pre-trial disclosure of their case only by pleading the privilege against self-incrimination (184). The Court of Appeals held that the defendants had a "remedy" in their Fifth Amendment privilege and that this was sufficient.

The opinion of the Court of Appeals majority is the first to suggest that while the Government may invoke the authority of the trial court to avoid disclosure of its case when

it brings concurrent civil and criminal suits, a person accused of a crime must yield discovery of his entire case to the prosecution except to the extent that he invokes his Fifth Amendment privilege against self-incrimination. The Court of Appeals thus rejected the substantial authority of decisions preventing discovery against the Government, which obviously has no Fifth Amendment privilege.

The Court of Appeals majority indicated complete misapprehension of the nature of a witness' Fifth Amendment rights when it suggested that petitioners could predicate refusal to testify in the civil case "on advice of counsel in order to prevent pretrial disclosure of their factual contentions" (184). The majority erred, for avoidance of pre-trial disclosure is not a legitimate Fifth Amendment ground for refusal to testify. The Fifth Amendment is concerned not with avoiding pre-trial disclosure, but only with testimony which may tend to incriminate. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *United States* v. *Costello*, 222 F.2d 656, 661 (2d Cir.), *cert. denied*, 350 U.S. 847 (1955).

The District Court correctly recognized that the Fifth Amendment privilege against self-incrimination is not the full measure of a defendant's right to a fair trial: "the rights on which defendants rely here are those governing the conduct of criminal proceedings with a view to assuring the fair administration of criminal justice to all parties. . . ." (165):

> "I see no reason why a defendant should be compelled to assert his Fifth Amendment privilege against self-incrimination against his will in order to protect other and different rights granted him by

rule, statute, constitution or even considerations of basic fairness." (166-167)

The remedy proffered by the Court of Appeals majority is not in the circumstances of this case any remedy at all, for petitioners might lose almost as much by refusal to testify on self-incrimination grounds as by conviction in the criminal case. We recognize that in law no stigma attaches to assertion of Fifth Amendment rights. Perhaps in the perfect society there would be no stigma of any kind. But we know as a matter of common sense that professional men associated with a distinguished firm of independent public accountants would end their careers by refusal to testify in order to avoid self-incrimination. See, Hook, COMMON SENSE AND THE FIFTH AMENDMENT (1957); *Ullmann* v. *United States*, 350 U.S. 422 (1956).

In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), this Court condemned coercion to testify by threatened loss of employment. *Garrity* requires a "free choice to speak out or to remain silent" (*Id.* at 497), a freedom which is undermined by the Court of Appeals majority here. The Court of Appeals majority would coerce petitioners to plead the privilege against self-incrimination, despite its impact upon their professional careers, or to yield an unfair advantage to the prosecution in the criminal case.

Fundamental as may be the Fifth Amendment's provision that no man shall be compelled to give testimony against himself, it is not the office of that historic provision to adjust and harmonize the different policies underlying pre-trial disclosure in civil and criminal litigation. The Fifth Amendment is not the full measure of a man's right to a criminal trial which is fundamentally fair and hardly comports with civilized standards of fairness to

say that since pre-trial disclosure to the prosecution of the entire defense case is a "natural by-product of another judicial proceeding" (183), a defendant's only remedy is his right against self-incrimination.

POINT III

The District Court has the jurisdiction and power to protect by injunction petitioners' rights to a fair trial. The granting of the injunction was a sound exercise of discretion.

The power of a federal criminal court to grant an injunction against civil discovery in the circumstances of this case is so clear that counsel for respondent conceded it in oral argument before the District Court (125). The Court of Appeals also assumed, without purporting to decide, that the District Court had power to issue the injunction (182), but later recognized the power by holding that the taking of depositions could be enjoined if they threatened "to interfere with the trial of the indictment." (186).

The District Court found three bases for its power to issue the injunction. The Court first noted its duty under the Federal Rules of Criminal Procedure to do all that may be necessary for the just determination of criminal cases:

> "The Federal Rules of Criminal Procedure, 'intended to provide for the just determination of every criminal proceeding,' must be construed by the courts 'to secure . . . fairness in administration.' Rule 2. And the courts are authorized, if no procedure is specifically prescribed by rule, to 'proceed in any lawful manner not inconsistent with these rules or with any applicable statute.' Rule 57(b). . . ." (156)

Second, power is conferred by the "All Writs" statute, 28 U.S. C. § 1651:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The All Writs Act has been invoked by the federal courts in a variety of circumstances in aid of their jurisdiction. See, *e.g., Steelman* v. *All Continental Corp.*, 301 U.S. 278 (1937) (injunction against prosecution of suit in another District Court); *Hanover* v. *Hegnes*, 269 Fed. 537 (8th Cir. 1920) (injunction against prosecution of stockholder litigation in state courts); *Bulloch* v. *United States*, 265 F. 2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959) (injunction against interference with civil rights). Recently, this Court held in *F. T. C.* v. *Dean Foods Co.*, 384 U.S. 597 (1966) that a Court of Appeals could enjoin corporate mergers even though no appeal was pending before the court and no Commission order had been entered from which an appeal could be taken.

There could be no more fitting application of the "All Writs" statute than to prevent by appropriate relief manifest unfairness which could taint the trial of a federal criminal case.

Third, the District Court held that it had the inherent power to issue an injunction to insure a fair criminal trial. Indeed, this Court has mandated such a duty to the federal courts. In *McNabb* v. *United States*, 318 U.S. 332 (1943), Mr. Justice Frankfurter stated:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of

> establishing and maintaining civilized standards of procedure and evidence . . .'' 318 U.S. at 340.
>
> ''The history of liberty has largely been the history of observance of procedural safeguards.'' *Id.* at 347.

The power and the duty of a criminal court to prevent unfairness was confirmed in *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), where this Court set aside a murder conviction because the trial court's failure to control the proceedings resulted in publicity which tainted the trial:

> ''The [trial] court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial . . .
>
> ''More specifically, . . . the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters . . . '' 384 U.S. at 357, 361. See also *Estes* v. *Texas,* 381 U.S. 532 (1965).

See *Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91, 98 (8th Cir. 1956), *United States* v. *Parrott,* 248 F. Supp. 196 (D.D.C. 1965); *Labette County Commissioners* v. *Moulton,* 112 U.S. 217 (1884); *Ex Parte Lennon,* 166 U.S. 548 (1897); *United States* v. *Steffes,* 35 F.R.D. 24 (D. Mont. 1964); *City of Fresno* v. *Edmonston,* 131 F. Supp. 421 (S.D. Cal. 1955).

Since the power of the District Court to issue the injunction is clear, the only question which remains is whether the injunction was a proper exercise of District Court discretion. The availability of other forms of relief, such as applications for stays in the civil case, does not in any sense lessen the responsibility of the criminal court to insure that the criminal case will be tried fairly and without

undue advantage to the prosecution. Where, as here, the District Court determines that fundamental unfairness would result unless an injunction were granted, the District Court's discretion should not be disturbed. As Judge Feinberg said in his dissenting opinion in the Court of Appeals, "the issue is one of discretion" (186) and "I think the district judge was right, and, in any event, would allow him to exercise his discretion" (187).

The District Court exercised its discretion here to avoid the kind of fundamental unfairness envisioned by Chief Justice Taft in *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

CONCLUSION

The decision of the Court of Appeals should be reversed and the District Court should be given the discretion to continue the injunction pending the final disposition of the criminal case.

Respectfully submitted,

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September 5, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SIMON ET AL. *v.* WHARTON.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 72. Decided December 18, 1967.

PER CURIAM.

Upon consideration of the joint motion to vacate, the judgments of the lower courts are vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the case as moot.